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In The

Supreme Court of the United States

JOEL ARGUELLES-OLIVARES,

Petitioner,

v.

ERIC HOLDER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The definition of an aggravated felony appears in the Immigration and Nationality Act (INA), section 101(a)(43). If an alien, including a legal permanent resident, has been convicted of a crime determined to be an aggravated felony under the INA, the alien must be detained and deported. Deported aliens cannot return to the United States, adjust their status to legal permanent resident, or become U.S. citizens.

This case presents two circuit splits regarding how to determine if a particular conviction renders an alien an aggravated felon:

1. The INA defines an aggravated felony, in part, as a conviction for either (i) fraud or deceit or (ii) an offense described in §7201 of the Internal Revenue Code, namely tax evasion.

   Does the second, more specific, subsection signify that tax evasion is the only tax code violation to constitute an aggravated felony under this subsection of the INA?

2. The categorical approach, derived from this Court's precedents in *Taylor*[1] and *Shepard*,[2] has been adopted by all circuit courts for

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[1] *Taylor* v. *United States*, 495 U.S. 575 (1990).

[2] *Shepard* v. *United States*, 544 U.S. 13 (2005).

QUESTIONS PRESENTED – Continued

ascertaining if an alien has been convicted of an aggravated felony under the INA, without the need for factfinding by the immigration court. The Fifth Circuit has limited the applicability of the categorical approach in certain circumstances, and held that immigration courts are instead required to engage in factfinding.

Does the Fifth Circuit's new rule give a factfinding role to the immigration courts that violates this Court's holdings in Taylor *and* Shepard *and which contravenes Congress's intent?*

Resolution of these two circuit splits is important because of the severe consequences of deportation to aliens and their families, and because commission of a particular crime should have the same immigration consequences in all circuits.

PARTIES TO THE PROCEEDING

The Petitioner here is:

Joel Arguelles-Olivares, also known as Joel Arguelles.

The Respondents here are:

Eric Holder, U.S. Attorney General,

Marc J. Moore, as Field Office Director for Detention and Removal for the Immigration and Customs Enforcement,

Bureau of Immigration and Customs Enforcement, as an Agency of the Government of the United States of America,

Department of Homeland Security, as an Agency of the Government of the United States of America,

Janet Napolitano, Secretary, Department of Homeland Security.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	iii
Table of Contents	iv
Table of Authorities	vii
Petition for a Writ of Certiorari	1
Opinions Below	1
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Preliminary Statement	3
Statement of the Case	7
A. Legal Background	7
1. How immigration courts determine whether an alien has been convicted of an aggravated felony	7
2. The categorical approach in the immigration context	8
3. Two circuits split regarding the aggravated-felony determination	10
4. Factfinding in the immigration courts	16
B. Facts	18
C. Procedural History	20
1. Removal Proceedings	20
2. Appeal to the Board of Immigration Appeals	23

TABLE OF CONTENTS – Continued

Page

3. Appeal to the Fifth Circuit 25
4. Revision of the Fifth Circuit's Opinion ... 33
5. Further Proceedings before the Fifth Circuit 35

Reasons for Granting the Petition 36

1. The circuit courts, and the immigration agency's courts, are deeply divided on two major points of law 36
2. Well accepted rules of statutory construction weigh against the Fifth Circuit's determination that INA §M(i) includes convictions under IRC §7206(1) 39
3. The Fifth Circuit erred in holding that the definition of an aggravated felony in INA §M(i) contains a non-element "collateral" factor 40
4. The Fifth Circuit's new standard requires the immigration courts to engage in factfinding, which is wasteful, and which raises due process and fairness concerns 41

Conclusion 43

APPENDIX

Fifth Circuit Revised Opinion, Feb. 5, 2009 ..... App. 1

Fifth Circuit Opinion, *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008) ..... App. 46

TABLE OF CONTENTS – Continued

Page

Board of Immigration Appeals Decision, Oct. 6, 2005 ..... App. 86

Immigration Judge Oral Opinion, Sept. 15, 2004 ..... App. 94

Fifth Circuit Order Denying Panel Rehearing and Rehearing En Banc, March 5, 2009 ..... App. 99

TABLE OF AUTHORITIES

Page

CASES

Abreu-Reyes v. *INS*, 350 F.3d 966 (CA9 2002) 17

Baliza v. *INS*, 709 F.2d 1231 (CA9 1983) 16

Boulware v. *United States*, 128 S.Ct. 1168 (2008) 27

Bridges v. *Wixon*, 326 U.S. 135 (1945) 8

Bustos-Torres v. *INS*, 898 F.2d 1053 (CA5 1990) 16

Calderon-Ontiveros v. *INS*, 809 F.2d 1050 (CA5 1986) 16

Conteh v. *Gonzales*, 461 F.3d 45 (CA1 2006) 10, 13, 17

Delgadillo v. *Carmichael*, 332 U.S. 388 (1947) 8

Dickson v. *Ashcroft*, 346 F.3d 44 (CA2 2003) 17, 32

Dulal-Whiteway v. *United States Dep't of Homeland Sec.*, 501 F.3d 116 (CA2 2007) 13, 17, 30

Eke v. *Mukasey*, 512 F.3d 372 (CA7 2008) 14

Fong Haw Tan v. *Phelan*, 333 U.S. 6 (1948) 8

Gonzales v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 9

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 28

INS v. *Errico*, 385 U.S. 214 (1966) 28

INS v. *St. Cyr*, 533 U.S. 289 (2001) 28

Karavolos v. *Ashcroft*, 95 Fed. Appx. 397 (CA3 2004) 18

Kawashima v. *Gonzales*, 503 F.3d 1000 (CA9 2007) (*Kawashima I*) 26, 33

TABLE OF AUTHORITIES – Continued

Page

Kawashima v. *Gonzales*, 530 F.3d 111 (CA9 2008) (*Kawashima II*) 12, 33

Lara-Chacon v. *Ashcroft*, 345 F.3d 1148 (CA9 2007) 17

Lara-Ruiz v. *INS*, 241 F.3d 934 (CA7 2003) 17

Lee v. *Ashcroft*, 368 F.3d 218 (CA3 2004) ..... *passim*

Li v. *Ashcroft*, 389 F.3d 892 (CA9 2004) 14, 30

Matter of Ajami, 22 I. & N. Dec. 949 (BIA 1999) 14

Matter of Babaisakov, 24 I. & N. Dec. 306 (BIA 2007) 12, 15

Navarro-Lopez v. *Gonzales*, 503 F.3d 1063 (CA9 2007) 14

Nijhawan v. *AG of the United States*, 523 F.3d 387 (CA3 2007) 15, 35

Nijhawan v. *Mukasey*, 129 S.Ct. 988, 2009 WL 10430, 2009 U.S. LEXIS 586 (U.S. Jan. 16, 2009) (No. 08-495)) (*Nijhawan II*) 15, 35, 37

Obasohan v. *United States AG*, 479 F.3d 785 (CA11 2007) 14, 17

Shepard v. *United States*, 544 U.S. 13 (2005) ..... *passim*

Singh v. *Ashcroft*, 383 F.3d 144 (CA3 2004) 15

Spies v. *United States*, 317 U.S. 492 (1943) 26, 27, 34

Tashnizi v. *INS*, 585 F.2d 781 (CA5 1978) 16

Taylor v. *United States*, 495 U.S. 575 (1990) ..... *passim*

Trias-Hernandez v. *INS*, 528 F.2d 366 (CA9 1975) 16

TABLE OF AUTHORITIES – Continued

Page

United States v. *Corona-Sanchez*, 291 F.3d 1201 (CA9 2002) 17

Vizcarra-Ayala v. *Mukasey*, 514 F.3d 870 (CA9 2008) 14

Woldiger v. *Ashcroft*, 77 Fed. Appx. 586 (CA3 2003) 18

STATUTES

8 U.S.C. §1101(a)(43) ..... *passim*

8 U.S.C. §1101(a)(43)(M) ..... *passim*

8 U.S.C. §1158(b)(2)(A)(ii) and (B)(i) 8

8 U.S.C. §1182(a)(9)(A)(i) and (ii) 8

8 U.S.C. §1226(c)(1)(B) 7

8 U.S.C. §1227(a)(2)(A)(iii) 2, 3, 7, 20

8 U.S.C. §1229b(3) 8

8 U.S.C. §1229c(b)(1)(C) 8

8 U.S.C. §1326(b)(2) 8

26 U.S.C. §7201 ..... *passim*

26 U.S.C. §7206(1) ..... *passim*

OTHER AUTHORITIES

Petition for a Writ of Certiorari filed in *Nijhawan* v. *Holder*, 08-495 37

Pub. L. No. 104-208, 110 Stat. 3009 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joel Arguelles-Olivares, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 526 F.3d 171 (CA5 2008). This opinion was published on April 22, 2008. On February 5, 2009, it was revised. The revision contained significant changes to Judge Dennis's dissent; however the opinion published on April 22, 2008, continues to be the only version available at the above citation. The revised opinion is located at App. 1 and is referred to throughout this Petition as "Revised Op."

The Board of Immigration Appeals issued an unpublished opinion on October 6, 2005, found at App. 86.

The Immigration Judge issued an oral opinion on September 15, 2004, found at App. 94.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 22, 2008. The Fifth Circuit denied Mr. Arguelles's petition for panel rehearing and for rehearing *en banc* on March 5, 2009.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1227(a)(2)(A)(iii) provides that any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. §1101(a)(43)(M) defines an aggravated felony as an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in 26 U.S.C. §7201, relating to tax evasion, in which the revenue loss to the government exceeds $10,000.

26 U.S.C. §7206(1) provides that one who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony.

PRELIMINARY STATEMENT

Petitioner Joel Arguelles-Olivares (Mr. Arguelles) pled guilty to making or subscribing a false tax return, in violation of 26 U.S.C. §7206(1).

As a consequence, he was charged with being removable under section 237(a)(2)(A)(iii)[3] of the Immigration and Nationality Act (INA), as defined by section 101(a)(43)(M).[4]

INA §101(a)(43)(M) defines an aggravated felony as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion)[5] in which

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[3] 8 U.S.C. §1227(a)(2)(A)(iii).

[4] 8 U.S.C. §1101(a)(43)(M).

[5] 26 U.S.C. §7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

> the revenue loss to the Government exceeds $10,000.[6]

Two circuit splits affect the outcome of this case. The first, the "tax issue," concerns whether a conviction under Internal Revenue Code (IRC) §7206(1), filing a false tax return, can ever be an aggravated felony for deportation purposes. The second, the "factfinding issue," concerns generally whether Congress intended for the immigration courts to engage in factfinding to determine whether an alien has committed an aggravated felony for deportation purposes, and specifically whether they can go outside the record of conviction for this purpose.

On the tax issue, Mr. Arguelles argues that well accepted rules of statutory construction dictate that a conviction under IRC §7206(1) can never be an aggravated felony under INA §101(a)(43)(M).

First, the specific controls the general. Here, §M(i) is a general provision encompassing all federal and state crimes of fraud or deceit, but §M(ii) singles out violations of IRC §7201 (tax evasion) specifically. The second, more specific, subsection signifies that tax evasion is the only tax code violation to constitute an aggravated felony under this subsection of the INA.

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[6] Because these two subsections are discussed extensively in this Petition, they are referred to as §§M(i) and M(ii), respectively, to spare the Court the cumbersome repetition of their full citations.

Second, the rule against surplusage requires a statute to be interpreted in a way that gives meaning to each word. As any conviction under IRC §7201 will involve fraud or deceit and would thus fall under §M(i), reading INA §M(i) to include other tax crimes renders §M(ii) mere surplusage.

Third, the rule of leniency requires that any lingering ambiguities in a deportation statute be resolved in favor of the alien, due to the serious consequences of deportation.

On the factfinding issue, Mr. Arguelles argues that, if §M(i) is found to include violations of IRC §7206(1), he still cannot be found to have committed an aggravated felony because there was insufficient evidence that he caused a loss exceeding $10,000. The immigration court relied on the pre-sentence investigative report (PSR) to determine the loss amount, in violation of this Court's precedents in *Taylor*[7] and *Shepard*.[8]

The categorical approach, defined in *Taylor* and *Shepard* and applied in the immigration context in all circuits, permits immigration courts to consult only the record of conviction to determine if an alien was convicted of an aggravated felony.

This categorical approach is consistent with the language of INA §237(a)(2)(A)(iii), which finds an

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[7] *Taylor* v. *United States*, 495 U.S. 575 (1990).

[8] *Shepard* v. *United States*, 544 U.S. 13 (2005).

alien deportable only if he has been *convicted* of an aggravated felony, not if he has merely *committed* one. By limiting the immigration court to the conviction record, and thereby preventing it from engaging in factfinding, the categorical approach preserves judicial resources and protects the alien from significant unfairness, for example from finding an alien removable on the ground that he committed a more serious crime than the crime he pled guilty to in a plea bargain.

The PSR is not a record of conviction, and is unreliable for the purpose of determining whether each element of the enumerated generic aggravated felony has been met. PSRs frequently refer to facts neither alleged nor admitted in court, and may contain inaccurate, unproven, and inadmissible facts.

The Fifth Circuit is alone in permitting use of the PSR to determine the loss amount in a §M(i) case. This holding is based on the court's determination that the loss amount, although specified in the statute, is not an element of the aggravated felony but merely a non-elemental collateral factor. The court provides no guidance to the immigration court in how to determine which words in INA §101(a)(43) refer to elements, and which refer to non-elemental factors. Worse, this new rule *requires* the immigration courts to engage in factfinding to determine whether the loss amount has been met.

Because the consequences of the aggravated-felony determination are serious and irreversible,

resolution of these two circuit splits is of national importance, and worthy of this Court's attention.

STATEMENT OF THE CASE

A. Legal Background

1. How immigration courts determine whether an alien has been convicted of an aggravated felony.

At issue in this case is how an immigration court determines whether an alien has been convicted of an aggravated felony, as defined by the Immigration and Nationality Act (INA). This is of vital importance because determination that an alien has been convicted of an aggravated felony opens the door to a cascade of irreversible and serious consequences for the alien, his family, and his extended community.

Most significantly, any alien who is convicted of an aggravated felony, at any time after admission to the United States, is removable.[9,10] Further, an alien in removal proceedings on aggravated-felony grounds is subject to mandatory detention throughout removal proceedings.[11] The aggravated felony conviction bars

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[9] Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, the term "removal" is now used in place of "deportation" to refer to the expulsion of an alien from the United States. Both terms are used interchangeably in this Petition.

[10] 8 U.S.C. §1227(a)(2)(A)(iii).

[11] *Id.* 8 U.S.C. §1226(c)(1)(B).

the alien from virtually all forms of relief from removal, including cancellation of removal,[12] voluntary departure,[13] and even political asylum.[14] Finally, once an alien has been removed for conviction of an aggravated felony, he may never lawfully return to the United States,[15] and he faces a stiff criminal penalty – up to 20 years of incarceration – for returning unlawfully.[16]

As this Court has long recognized, "deportation is a drastic measure and at times the equivalent of banishment or exile."[17] Consequently, much hangs in the balance when the immigration court asks whether a particular conviction constitutes an aggravated felony.

2. The categorical approach in the immigration context.

Where an alien has been convicted of a state or federal crime, the immigration court must determine if the crime of conviction is encompassed by the

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[12] *Id.* 8 U.S.C. §1229b(3).

[13] *Id.* 8 U.S.C. §1229c(b)(1)(C).

[14] *Id.* 8 U.S.C. §1158(b)(2)(A)(ii) and (B)(i).

[15] *Id.* 8 U.S.C. §1182(a)(9)(A)(i) and (ii).

[16] *Id.* 8 U.S.C. §1326(b)(2).

[17] *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948); *see also Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947); *Bridges* v. *Wixon*, 326 U.S. 135, 147 (1945).

generic crime identified in INA §101(a)(43).[18] The categorical approach, defined by the Supreme Court in *Taylor*, is used to address this question.[19]

The categorical approach was developed for the purpose of determining if a prior criminal conviction constituted an enumerated generic offense for sentence enhancement, and has been extended to the immigration context by all circuits.[20] In this approach, the court looks to the definition of the crime of conviction, and not to the facts behind the offense.[21] Congress indicated its intent for the sentencing courts to look only to the fact of conviction, and not the underlying facts, by referring to the "conviction" of certain crimes, not their "commission." Additionally, the approach avoids many practical difficulties and potential unfairness to a defendant.[22]

The categorical approach is not absolute. When the statute of conviction prohibits a broader range of conduct than the generic offense, such that a conviction can be obtained for conduct described by the generic offense or for conduct which is not, the Court's

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[18] 8 U.S.C. §1101(a)(43).

[19] *Taylor*, 495 U.S. 575.

[20] *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007).

[21] *Taylor*, 495 U.S. at 600.

[22] *Id.* at 601.

"modified" categorical approach[23] permits the immigration court to go beyond the mere fact of conviction and consult the charging paper and jury instructions in order to determine whether the earlier factfinder was actually required to find all the elements of the generic crime.[24]

In *Shepard*, the Court added that, in a non-trial case, the reviewing court might examine not only the charging document but also the terms of a plea agreement, the transcript of colloquy between judge and defendant, or "some comparable judicial record" of information about the factual basis for the plea.[25]

3. Two circuits split regarding the aggravated-felony determination.

Of relevance to this case is that INA §101(a)(43)(M)[26] defines an aggravated felony as:

> an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

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[23] *Conteh* v. *Gonzales*, 461 F.3d 45, 54 (CA1 2006) (observing that some courts refer to this step of the *Taylor* inquiry as a "modified categorical approach").

[24] *Taylor*, 495 U.S. at 602.

[25] *Shepard*, 544 U.S. at 26.

[26] 8 U.S.C. §1101(a)(43)(M).

> (ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion)[27] in which the revenue loss to the Government exceeds $10,000.

Two circuit splits exist touching this definition.

The first split, which we refer to as the "tax issue," is whether a violation of a *different* section of the tax code, IRC §7206(1) (filing a false tax return),[28] is an aggravated felony under INA §M(i). Three circuits have answered this three different ways:

> 1. No: Because Congress specified that §7201 of the tax code is an aggravated felony under §M(ii), it intended for §7201 to be the only tax code violation to constitute an aggravated felony under INA §101(a)(43)(M). (Third Circuit.[29])

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[27] 26 U.S.C. §7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 5 years, or both, together with the costs of prosecution.").

[28] *Id.* §7206(1) ("Any person who – [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter – shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... , or imprisoned not more than 3 years, or both, together with the costs of prosecution.").

[29] *Lee* v. *Ashcroft*, 368 F.3d 218, 224 (CA3 2004).

2. NO: When the crime of conviction is missing an element of the generic crime, the crime of conviction can never be an aggravated felony because no fact-finder is required to find all the elements of the generic crime. Because there is no element of loss under §7206(1), it cannot be an aggravated felony under §M(i), which requires loss exceeding $10,000. (Ninth Circuit.[30])

3. YES: INA §M(i) includes a violation of §7206(1) by virtue of the fact that conviction under §7206(1) requires proof of fraud. Whether the alien caused a loss exceeding $10,000 is a factual question, not an element of the generic crime. (Fifth Circuit, below.[31])

The second split, which we call the "factfinding issue," arises only if the applicability of INA §M(i) to a conviction under IRC §7206(1) is assumed. This issue is whether and how to apply the Supreme Court's *Taylor-Shepard* categorical approach to determine whether the $10,000 loss requirement has been met.

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[30] *Kawashima* v. *Gonzales*, 530 F.3d 111 (CA9 2008) (*Kawashima II*).

[31] Revised op. at 10-11. *Accord*, *Matter of Babaisakov*, 24 I. & N. Dec. 306, 316 (BIA 2007) ("Our conclusion that the $10,000 loss figure in section 101(a)(43)(M)(i) of the Act was not intended to describe an 'element' of a 'fraud or deceit' crime takes this victim loss aspect of the statute outside the scope of the categorical approach of *Taylor* and *Shepard*.").

Answering this question turns on whether Congress intended for the immigration courts to engage in factfinding beyond an examination of the statutory definition of the crime. Again, there is a circuit split.

1. Five circuits, and Judge Dennis dissenting in the Fifth Circuit's opinion below,[32] have held that each element of the generic crime must be contained in the record of conviction, the immigration court is limited to looking at the record of conviction, and the court may not conduct its own factfinding. (First,[33] Second,[34]

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[32] Revised Op. 29 (J. Dennis, dissent) (arguing that, under *Taylor*, "when a statute of conviction criminalizes both conduct that would constitute a removable offense and conduct that would not, IJs might appropriately consult an indictment or jury instructions to determine the basis of an alien's conviction, but IJs cannot look behind the record of conviction to reach their own determination as to whether the underlying facts constitute a conviction for an aggravated felony.").

[33] *Conteh* v. *Gonzales*, 461 F.3d at 56 (holding that when "the statute on which the prior conviction rests sweeps more broadly [than the generic crime], the government, in accordance with the animating principle of *Taylor*, must demonstrate, by reference only to facts that can be mined from the record of conviction, that the putative predicate offense constitutes a crime designated as an aggravated felony in the INA.").

[34] *Dulal-Whiteway* v. *United States Dep't of Homeland Sec.*, 501 F.3d 116, 131 (CA2 2007) (holding that "the BIA, in determining whether an alien is removable based on a conviction for an offense set forth in the INA, may rely only upon information appearing in the record of conviction.").

Seventh,[35] Ninth,[36] and Eleventh[37] Circuits.)

2. Two circuits and the Board of Immigration Appeals (BIA) have held that where the generic crime specifies an amount of loss suffered by a victim, the immigration court is free to conduct its own factfinding to determine the amount of loss, and may refer to any admissible

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[35] *Eke* v. *Mukasey*, 512 F.3d 372, 379 (CA7 2008) (holding that the court must look "at the 'terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.'" (quoting *Shepard*, 544 U.S. at 26).

[36] *Navarro-Lopez* v. *Gonzales*, 503 F.3d 1063, 1073 (CA9 2007) (en banc) ("When the crime of conviction is missing an element of the generic crime altogether, we can never find that 'a jury was actually required to find all the elements of' the generic crime." (citing *Li* v. *Ashcroft*, 389 F.3d 892, 899-901 (CA9 2004) (Kozinski, J., concurring)). *Accord*, *Vizcarra-Ayala* v. *Mukasey*, 514 F.3d 870, 877-78 (CA9 2008).

[37] *Obasohan* v. *United States AG*, 479 F.3d 785, 788 (CA11 2007) (holding that if the statute of conviction sweeps more broadly than the generic office, "the IJ must look to 'the record of conviction, meaning the indictment, plea, verdict, and sentence, to determine the offense of which the respondent was convicted.'" (quoting *Matter of Ajami*, 22 I. & N. Dec. 949, 950 (BIA 1999)).

evidence. (Third Circuit,[38] Fifth Circuit,[39] and BIA.[40])

If the amount of loss is a factual matter, not an element of the generic crime, testimony, documents, and other evidence can be admitted and considered by the immigration judge. Immigration courts are not bound by the Federal Rules of Evidence, so evidence

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[38] *Nijhawan* v. *AG of the United States*, 523 F.3d 387, 391 (CA3 2007) (holding that "the language of §1101(a)(43)(M)(i) does not require a jury to have determined that there was a loss in excess of $10,000.") cert. granted, in part, by *Nijhawan* v. *Mukasey*, 129 S.Ct. 988 (U.S., Jan. 16, 2009). *Accord, Singh* v. *Ashcroft*, 383 F.3d 144, 142 (CA3 2004) (holding that "a departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. The qualifier 'in which the loss to the victim or victims exceeds $10,000' ... expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue.").

[39] Revised Op. 10-11 (holding that "[t]he requirement that the offense was one 'in which the loss to the victim or victims exceeds $10,000' is a factual matter to be determined from the record of conviction, but the amount of loss is not required to be an element of the conviction itself.... When the amount of loss to a victim is not an element of an offense, the focus should not be limited to the conviction itself.... We should determine, therefore, whether there was clear and convincing evidence [of the amount of loss] and whether the evidence establishing that the conviction involved such a loss was reasonable, substantial, and probative.").

[40] *Babaisakov*, 24 I. & N. Dec. at 316 (holding that "the $10,000 loss figure in section 101(a)(43)(M)(i) of the Act was not intended to describe an 'element' of a 'fraud or deceit' crime [which] takes this victim loss aspect of the statute outside the scope of the categorical approach of *Taylor* and *Shepard*.").

is admissible if it is "probative" and "its use is fundamentally fair so as not to deprive the alien of due process of law."[41] Evidence typically excluded from criminal trials, such as hearsay or privileged communications, may thus be admitted and considered.[42]

4. Factfinding in the immigration courts.

Should this Court find that Congress intended for the immigration courts to conduct such factfinding to determine if non-element factors of the generic crime have been met, one further question remains: does a pre-sentence investigative report (PSR) provide sufficient proof for the purpose of declaring an alien an aggravated felon?

Again, there is a circuit split. This time, the Fifth Circuit stands alone in holding that a PSR is admissible for the aggravated-felony determination.[43]

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[41] *Bustos-Torres* v. *INS*, 898 F.2d 1053, 1055 (CA5 1990) (citing *Calderon-Ontiveros* v. *INS*, 809 F.2d 1050 (CA5 1986); *Baliza* v. *INS*, 709 F.2d 1231 (CA9 1983); *Tashnizi* v. *INS*, 585 F.2d 781 (CA5 1978); *Trias-Hernandez* v. *INS*, 528 F.2d 366 (CA9 1975)).

[42] *See, e.g., Bustos-Torres* v. *INS*, 898 F.2d 1053, 1055 (CA5 1990).

[43] Revised Op. 13-14 (holding that a PSR can be admitted if there is "clear and convincing evidence that the PSR accurately reflects the amount of loss.").

The First,[44] Second,[45] Ninth,[46] and Eleventh[47] Circuits have all held to the contrary. The Seventh Circuit has come to a similar conclusion, without ruling specifically on the admissibility of a PSR,[48] and

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[44] *Conteh* v. *Gonzales*, 461 F.3d at 58 ("[T]he BIA's consultation of the PSI Report as proof of the specific facts underlying the petitioner's prior conviction was improper.").

[45] *Dulal-Whiteway*, 501 F.3d at 128-29 ("The government maintains that it was proper for the IJ to rely upon ... the PSR ... as part of that record in order to establish the loss amount associated with Dulal's fraud and thus his removability. We disagree. In applying the modified categorical approach, we have looked to ... the 'record of conviction.' "); *Dickson* v. *Ashcroft*, 346 F.3d 44, 55 (CA2 2003) (holding that although it is possible that a PSR might be used if it identified the branch of a statute which the alien was convicted under, immigration courts may not rely on factual narratives in a PSR to determine the crime for which an alien has been convicted).

[46] *Lara-Chacon* v. *Ashcroft*, 345 F.3d 1148, 1153 (CA9 2007) ("[A] PSR alone does not 'unequivocally establish' the elements of a conviction where the statute of conviction is not a categorical match."); *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1212 (CA9 2002) (*en banc*) (PSR "reciting the facts of the crime is insufficient evidence to establish that the defendant pled guilty to the elements of the generic definition of a crime when the statute of conviction is broader than the generic definition."); *Abreu-Reyes* v. *INS*, 350 F.3d 966, 997 (CA9 2002) ("The immigration judge was not authorized to use the pre-sentence report in determining whether petitioner was an aggravated felon for purposes of removal.").

[47] *Obasohan*, 479 F.3d at 789-91 (holding that an immigration court was not entitled to rely on loss amounts that were alleged only in a PSR).

[48] *Lara-Ruiz* v. *INS*, 241 F.3d 934, 941 (CA7 2003) ("[S]entencing courts can look to the charging document, and if that yields no clear answer, they can look beyond such

(Continued on following page)

the Third Circuit, in two unpublished cases, expressed unease at the prospect of admitting a PSR for these purposes. In one case, the Third Circuit avoided addressing the question at all, as it found that "the judgment of conviction, even without the PSR, sufficiently establishes that petitioner's offense involved a loss in excess of $10,000 and was an aggravated felony."[49] In the other case, the court raised significant concerns about the value of the contents of a PSR and cited, with approval, several circuit court decisions limiting the documents which can be consulted for sentencing purposes to charging documents, jury instructions, plea agreements, and plea hearing transcripts.[50]

The weight of the opinion is clear: PSRs are improper to use to determine whether an alien was convicted of an aggravated felony.

B. Facts

The Petitioner, Mr. Joel Arguelles-Olivares, was born in Mexico. He is 52 years old. On April 6, 1977,

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documents (for example, to the criminal complaint), provided that doing so would not require evidentiary hearings into contested issues of fact.").

[49] *Karavolos* v. *Ashcroft*, 95 Fed. Appx. 397, 398 (CA3 2004) (unpublished).

[50] *Woldiger* v. *Ashcroft*, 77 Fed. Appx. 586, 590-94 (CA3 2003) (unpublished).

at age 20, he was admitted to the United States as a Legal Permanent Resident.

Mr. Agruelles has lived in Texas since his arrival. His mother, two sisters, and two brothers – all naturalized U.S. citizens – also live in Texas. His eldest daughter, Ana, graduated from Baylor University with a degree in journalism, and currently works in Dallas for a yearbook publishing company. His two younger girls, [Name Of Minor Child Omitted] (age 11) and [Name Of Minor Child Omitted] (age 8), are in elementary school. All three children, and his wife Pearl, are natural-born U.S. citizens.

Mr. Arguelles has, in many ways, achieved the American Dream. After his arrival in the U.S., he built a very successful masonry contracting business which employed several managers and sub-contractors. He owned two houses, one on 19 acres with a landing strip and a hangar for his private plane. He employed many U.S. citizens and legal permanent residents, and contributed to the local economy and his community.

In April 2003, he was indicted for making or subscribing a false tax return, in violation of 26 U.S.C. §7206(1). On May 1, 2003, Mr. Arguelles pled guilty to that charge, in accordance with a written plea agreement; this plea agreement and the factual basis of his plea are not in the administrative record. Mr. Arguelles was sentenced to 21 months of custody, at the bottom end of the 21 to 27 month range in the

sentencing guidelines. All fines and costs were waived.

Removal proceedings commenced while he was in custody, and upon his release from custody, in 2005, Mr. Arguelles was removed to Mexico. He remains there, separated from his wife and children, pending the outcome of the appeals process.

C. Procedural History

1. Removal Proceedings.

Mr. Arguelles was served with a Notice to Appear (NTA) on June 24, 2004, while he was in custody. This NTA alleged, *inter alia*, that Mr. Arguelles was convicted under 26 U.S.C. §7206(1), which he admitted, and to having caused a loss to the government exceeding $10,000, which he denied. The NTA charged Mr. Arguelles with being removable under INA §237(a)(2)(A)(iii),[51] for having been convicted of an aggravated felony as defined in INA §101(a)(43)(M). Mr. Arguelles denied the charge at a removal hearing on August 11, 2004.

At this hearing, the government introduced Mr. Arguelles's criminal information and the judgment of conviction, to which his counsel did not object. The information charged Mr. Arguelles with willfully making and subscribing a tax return for calendar year 1999 which he did not believe to be true. It

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[51] 8 U.S.C. §1227(a)(2)(A)(iii).

further stated that his reported taxable income was "substantially in excess" of the income stated on this return, and that "a substantial additional tax was due." Neither the information nor the judgment contained any information regarding the dollar value of loss sustained, if any, by the victim (the U.S. Treasury).

The government also introduced the pre-sentence investigation report (PSR), to which his counsel did object, on the grounds that (a) only a conviction record can be used to determine if a conviction constitutes an aggravated felony, and (b) a PSR is a confidential report to be used for the sole purpose of sentencing in a criminal proceeding. The PSR was admitted over objection, for the immigration court to use to determine the nature of the offense. Mr. Arguelles re-raised his objection on confidentiality grounds at the later September 1, 2004, hearing, and his objection was again denied.

The PSR contained the following relevant information:

- The defendant pled guilty in accordance with a written plea agreement, "wherein the Government and the defendant agree that the tax loss for sentencing purposes will include the loss from the tax years 1992 through 2000 for a total tax loss of $248,335."
- The defendant's additional tax due/ owing "as determined by the IRS" for the year 1999 is $75,982.

- "The IRS determined that the defendant owes $248,335 in unpaid taxes."

At a hearing on September 15, 2004, Mr. Arguelles urged that a conviction under IRC §7206(1) does not fall under INA §M(i) because the only tax offense which falls under INA §101(a)(43)(M) is that defined in §M(ii), namely a violation of IRC §7201. Mr. Arguelles cited to the Third Circuit's decision in *Lee* v. *Ashcroft*.[52]

The immigration judge (IJ) issued an oral opinion on September 15, 2004.[53]

The Tax Issue The IJ ruled that a violation of IRC §7206(1) falls under INA §M(i), because the element of fraud is common to both statutes, and because he can envision conduct which constitutes tax evasion but which does not involve fraud or deceit.[54]

The Factfinding Issue The IJ held that it was proper to admit the PSR as it was "a prior report" and "relevant to the factual allegation" that Mr. Arguelles caused a loss exceeding $10,000.[55] The IJ made no mention of the categorical approach, *Taylor*, or *Shepard* in his opinion.

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[52] *Lee* v. *Ashcroft*, 368 F.3d at 220.

[53] IJ Op.

[54] *Id.* at 3-4.

[55] *Id.* at 2.

2. Appeal to the Board of Immigration Appeals.

A timely appeal to the Board of Immigration Appeals (BIA) was filed, challenging the IJ's decision on both issues. A non-precedential, single-author opinion was issued on October 6, 2005.[56]

The Tax Issue Regarding the issue of whether a conviction under section §7206(1) of Internal Revenue Code can constitute an aggravated felony under INA §101(a)(43)(M), the BIA held that it was not bound to follow the precedent established by the Third Circuit in *Lee* v. *Ashcroft*,[57] as that circuit's rulings are not binding on this case, which arose out of the Fifth Circuit.[58]

Additionally, the BIA analyzed the language of §M(i) alone. Noting that a statutory interpretation "begins with the terms of the statute itself," and that the "plain meaning of the words ordinarily controls," the BIA found that Congress did not exempt tax-related crimes from the aggravated felony definition in that section.[59]

The BIA did not address, or even mention, the analysis of the Third Circuit in *Lee*. Instead, it explained that the dissent in *Lee*, penned by then-Judge

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[56] BIA Dec.

[57] *Lee* v. *Ashcroft*, 368 F.3d 218.

[58] BIA Dec. at 1.

[59] *Id.* at 1-2.

Alito, was persuasive.[60] Judge Alito had argued that the drafters of the definition had included a violation of IRC §7201 in INA §M(ii) "simply to make certain – even at the risk of redundancy – that tax evasion qualifies as an aggravated felony."[61]

The Factfinding Issue The BIA next addressed whether the IJ's consultation of the PSR to determine whether the required loss had occurred.[62] The BIA provided three reasons why it was not an error for the IJ to rely on the PSR.

First, the PSR stated that the information it contained reflected information which was in the plea agreement (which was not in the administrative record).[63]

Second, the BIA stated that "the loss is not an element of the underlying criminal statute," but instead is "a collateral issue."[64] The BIA explained that, because the amount of loss is not a specific element in typical fraud statutes:

> [I]ts inclusion in the aggravated felony definition signals that proof, aside from that pertaining to elements of criminal offenses, should be allowed in removal proceedings.

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[60] *Id.* at 2.

[61] *Lee* v. *Ashcroft*, 368 F.3d at 226 (J. Alito, dissenting).

[62] BIA Dec. at 1.

[63] BIA Dec. at 2-3.

[64] *Id.* at 3.

> In making findings regarding collateral matters, the Immigration Judge was entitled to examine any reliable, credible evidence in reaching his conclusion regarding whether the respondent was removable as charged. An Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the case made by the alien or any other person during any investigation or examination. Such evidence may be admitted as long as it is probative and its use is fundamentally fair so as not to violate due process standards.[65]

The BIA concluded that use of the PSR was not "fundamentally unfair" given Mr. Arguelles's failure to object to its contents during his criminal proceedings, and the appeal was dismissed.[66]

3. Appeal to the Fifth Circuit.

A timely petition for review of the BIA's decision was filed with the Fifth Circuit. The court's decision was issued on April 22, 2008. The majority, Judges Owen and Garwood, upheld the BIA's rulings on both issues; Judge Dennis dissented strongly on both.

The Tax Issue At the time, the Fifth Circuit faced a circuit split between the Third and Ninth Circuits regarding which tax offenses may be

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[65] *Id.* at 3-4 (internal citations omitted).

[66] BIA Dec. at 1.

aggravated felonies. The Third Circuit held that IRC §7201 was the only tax offense which fell under INA §101(a)(43)(M), and the Ninth Circuit held that a conviction under §7206(1) could constitute an aggravated felony under §(M)(i).[67] The Fifth Circuit majority sided with then-Judge Alito's dissent in the Third Circuit and the Ninth Circuit's holding in *Kawashima I*.[68]

The majority criticized the Third Circuit's reasoning on a number of grounds. It held that §M(i) "is straightforward and unambiguous," but conceded that the "difficulty in construing (43)(M)(i) is the immediately succeeding subsection" §M(ii). The Fifth Circuit majority, however, felt that Congress "may well have seen" §M(ii) as necessary as "neither fraud nor deceit is a specific element" under §7201.[69]

The Fifth Circuit focused its criticism of *Lee* on its analysis of the role of IRC §§7201 (tax evasion) and 7206(1) (filing a false return) in the tax code scheme,[70] by questioning the Third Circuit's reliance on this Court's decision in *Spies* v. *United States*.[71]

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[67] Op. at 2-3 (citing *Lee* v. *Ashcroft*, 368 F.3d 218 and *Kawashima* v. *Gonzales*, 503 F.3d 1000 (CA9 2007) (*Kawashima I*)).

[68] The Ninth Circuit later withdrew its opinion in *Kawashima I*. This is discussed below.

[69] Op. at 5.

[70] *Id.* at 5-7.

[71] *Spies*, 317 U.S. 492.

Spies characterized tax evasion as the capstone of tax law violations, and the Third Circuit found it consistent with the history and structure of criminal tax offenses for Congress to select tax evasion, the capstone, as the only aggravated tax felony justifying deportation, while sparing lesser tax felons.[72]

The Fifth Circuit criticized the Third Circuit's reasoning by noting that, although the Supreme Court has labeled tax evasion as the capstone crime, it has also noted that filing a false return is "[a] related provision,"[73] interpreting this statement as diluting the capstone argument advanced by the *Lee* Court.[74] It further disagreed that tax evasion and filing a false return differed so significantly that Congress would deport an alien for committing one but not the other, despite Congress's choice to punish tax evasion more severely than it punishes filing a false return.[75]

The majority did not address the Third Circuit's other two points, that the specific governs the general, and that where a deportation statute is ambiguous it should be construed in favor of the alien.

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[72] Op. at 6 (citing *Lee* v. *Ashcroft*, 368 F.3d at 224).

[73] *Id.* at 6 (citing *Boulware* v. *United States*, 128 S.Ct. 1168, 1173 (2008)).

[74] *Id.* at 6-7.

[75] *Id.* at 5 (up to five years of incarceration for tax evasion, up to three years for filing a false return, the same maximum fine for either).

Judge Dennis, in dissent, stated that "the Third Circuit majority's reasoning appears to be well-grounded in familiar statutory interpretation principles."[76] Judge Dennis agreed with the Third Circuit that the juxtaposition of subsections M(i), a general provision encompassing fraud or deceit, and M(ii), a specific provision focused only on federal tax evasion, "suggests, at the very least, an ambiguity."[77] Where a deportation statute is ambiguous, courts are to apply "the longstanding principle of construing any lingering ambiguities ... in favor of the alien."[78]

In an extensive footnote, Judge Dennis explained that he "find[s] puzzling the majority's attempt, unsupported by any authority whatever, to cabin the language used by Justice Jackson in *Spies*...."[79] He argued that "the conceptual difference between evasion and false filing is significant. The former requires knowing intent to cause loss to the Government, whereas the latter requires only knowing intent to file a false return."[80]

Judge Dennis called for a "more encompassing analysis than that offered in the majority opinion

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[76] *Id.* at 21 (J. Dennis, dissenting).

[77] *Id.* at 21.

[78] *Id.* at 21 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001), *INS* v. *Errico*, 385 U.S. 214, 225 (1966)).

[79] *Id.* at 22, n.5.

[80] *Id.* at 22, n.5.

before this Circuit aligns itself with either the Third or Ninth Circuit's position ... which has such serious consequences for aliens and their families."[81]

The Factfinding Issue The majority held that the IJ did not err in relying on the PSR to ascertain whether Mr. Arguelles caused a loss to the government exceeding $10,000.[82]

The majority agreed with Mr. Arguelles that the modified categorical approach restricts the documents that may be consulted to determine whether a conviction was for a generic offense, and thus the focus is, properly on the conviction. However, it held that:

> When the amount of loss to a victim is not an element of the offense, the focus should not be limited to the conviction itself.... When a tribunal subsequently examines, for collateral purposes like those here, the amount of loss resulting from an offense, the reason for applying the modified categorical approach does not fully obtain. Our inquiry should be guided by the statute that initiates that inquiry. The Immigration and Nationality Act provides that the government "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." The Act further

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[81] *Id.* at 22.

[82] *Id.* at 8, 16.

> specifies, "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." We should determine, therefore, whether there was clear and convincing evidence that Arguelles-Olivares's prior conviction involved an amount of loss greater than $10,000 and whether the evidence establishing that the conviction involved such a loss was reasonable, substantial, and probative. These are the standards that apply in determining whether the BIA erred in relying on the PSR to determine the amount of loss.[83]

The majority acknowledged that this new standard is unique to the Fifth Circuit, and conflicts with the Ninth Circuit's standard, in *Li* v. *Ashcroft*,[84] and the Second Circuit's standard, in *Dulal-Whiteway*.[85]

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[83] *Id.* at 11-12.

[84] *Li* v. *Ashcroft*, 389 F.3d 892, 897 (CA9 2004) (holding that "if the record of conviction demonstrates that the jury in Petitioner's case actually found that Petitioner caused, or intended to cause, a loss to the government of more than $10,000, the modified categorical approach will be satisfied," but not otherwise).

[85] *Dulal-Whiteway*, 501 F.3d at 131 (holding that "the BIA, in determining whether an alien is removable based on a conviction for an offense set forth in the INA, may rely only upon information appearing in the record of conviction that would be permissible under the *Taylor-Shepard* approach in the sentencing context.").

Judge Dennis dissented sharply, saying:

> The majority's second decision is particularly unfortunate because it exposes aliens in this Circuit to the potential of unfair practices, inequality of justice, and deportations based on constructive paper trails without juries rather than on records of judicial convictions.[86]

Judge Dennis was concerned with the Fifth Circuit's determination that the *Taylor-Shepard* categorical approach did not apply to this case.[87]

First, he worried about "the unfairness that could result if a factual approach was applied to prior guilty plea convictions,"[88] quoting this Court's opinion in *Taylor* which noted that "if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary."[89] He emphasized that the INA renders removable an alien who has been convicted of an aggravated felony, not one who has committed an aggravated felony.[90]

Second, he was concerned with the consequences of making deportation determinations based on

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[86] Op. at 17 (J. Dennis, dissenting).

[87] *Id.* at 26.

[88] *Id.* at 25.

[89] *Taylor*, 495 U.S. at 601-02.

[90] Op. at 27 (citing *Dulal-Whiteway*, 501 F.3d at 125).

unreliable sources of information, and with the practical difficulties that would arise if immigration courts were permitted to consider the facts behind prior convictions.[91]

PSRs, he explained, frequently refer to facts neither alleged nor admitted in court,[92] and may contain inaccurate, unproven, and inadmissible facts.[93]

By contrast, the record of conviction is "sufficiently conclusive and reliable to establish the facts to which the alien actually pleaded guilty," and if they do not establish those facts, "we must find that the government has not met its burden of proving" that the petitioner was necessarily convicted of an aggravated felony, and the conviction may not be used as a basis for removal.[94]

He concluded that, in this case, the record of conviction was insufficient for concluding that Mr. Arguelles was necessarily convicted of an aggravated felony, and thus subject to removal.[95]

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[91] *Id.* at 24, 26.

[92] *Id.* at 28.

[93] *Id.* at 30 (citing *Dickson* v. *Ashcroft*, 346 F.3d at 54).

[94] Op. at 26 (internal quotations and citations omitted).

[95] *Id.* at 32.

4. Revision of the Fifth Circuit's Opinion.

The Tax Issue The Fifth Circuit revised its opinion on February 5, 2009,[96] after the Ninth Circuit had withdrawn its opinion in *Kawashima I*[97] and replaced it with *Kawashima II* which explicitly held that a conviction under §7206(1) can never be an aggravated felony within the meaning of §M(i) because "Subsection M(i)'s monetary loss requirement [is] an 'element' of the generic offense, [and] the record of petitioner's conviction must demonstrate that the jury actually found or the petitioner (as defendant) necessarily admitted."[98]

Despite this change in the law, the majority opinion continued to align itself with *Kawashima I*, and in fact made no mention that it had been withdrawn.[99] Judge Dennis, however, began his dissent by noting that this change "leaves this Circuit now standing alone in holding that filing a false tax return can be an aggravated felony for purposes of removal."[100] He further chastised the majority's analysis, saying:

> The lack of detailed analysis in the majority's opinion on this matter is now thus all the

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[96] Revised Op. at 1.

[97] *Kawashima I*, 503 F.3d 997, withdrawn 2008 U.S. App. LEXIS 14691, ___ F.3d ___ (CA9 July 1, 2008).

[98] *Kawashima II*, 530 F.3d 1111.

[99] Revised Op. at 3.

[100] *Id.* at 17-18 (J. Dennis, dissenting).

> more troubling. The majority gives no weight whatever to the INA's designation of tax evasion as the sole tax offense explicitly named as an "aggravated felony"; the majority does not even attempt to explain away the sharp clash between its alien-hostile statutory construction and the traditional principle of construing uncertain statutes in favor of aliens.[101]

Judge Dennis moved his commentary on the majority's dismissal of the significance of *Spies* from a footnote into the main body of his dissent, and expanded on his assertion that "the conceptual difference between evasion and false filing is significant," saying:

> [T]he gravity of tax evasion as compared to the relatively less serious offense of filing a false tax return is reflected in judicial understandings of the goals of §§7206(1) and 7201-§7206(1) is in essence a perjury statute, while §7201 addresses tax evasion. The crimes have different elements and different levels of blameworthiness.... Congress chose to criminally punish tax evasion more severely than filing a false return; and it is reasonable to infer that Congress intended that the stigma of removal attach to tax evasion but not to false return filing.[102]

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[101] *Id.* at 18.

[102] *Id.* at 23-24.

Again he urged the court to conduct "a more encompassing analysis ... [i]n light of the weighty matters of statutory history, construction, and interpretation involved."[103]

The Factfinding Issue Regarding the use of the PSR, the only change to the opinion was the addition of a footnote in Judge Dennis's dissent quoting a dissent, from Judge Stapleton, in the Third Circuit's recent decision in *Nijhawan* v. *Attorney General*, a case currently before this Court. Judge Stapleton noted that "This Court has never before found an alien deportable for conduct the alien was neither convicted of nor pled guilty to; the Court's approach, therefore, will significantly expand the reach of the INA's 'aggravated felony' provisions...."[104]

5. Further Proceedings before the Fifth Circuit.

Mr. Arguelles petitioned for a panel rehearing, arguing that the Fifth Circuit panel misapprehended two facts critical to its affirmance of the removal order. This petition was denied without comment on March 5, 2009.

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[103] *Id.* at 25.

[104] *Id.* at 32-33, n.11 (quoting *Nijhawan*, 523 F.3d at 403 (Stapleton, J., dissenting) *cert. granted in part*, *Nijhawan* v. *Mukasey*, 129 S.Ct. 988, 2009 WL 10430, 2009 U.S. LEXIS 586 (U.S. Jan. 16, 2009) (No. 08-495)).

Mr. Arguelles also petitioned for a rehearing *en banc*, arguing that, as the majority acknowledged, both holdings conflict with the decisions of other circuits and that as Judge Dennis noted in dissent, the second holding conflicts with precedent of this Court. His petition was denied without comment on March 5, 2009.

REASONS FOR GRANTING THE PETITION

There are at least three reasons why the Court should grant certiorari in this case, which all boil down to this: the lower courts and the immigration courts are in disarray on the two issues, the Fifth Circuit's holdings are incorrect, and these issues are of considerable national importance.

This case is an excellent vehicle for resolving these splits, as there are no factual questions remaining in the case, no questions of waiver, and no jurisdictional challenges.

1. The circuit courts, and the immigration agency's courts, are deeply divided on two major points of law.

There are two clear circuit splits presented in this case. These splits concern how to determine if an alien has been convicted of an aggravated felony, and thus aliens face significantly different immigration consequences according to which circuit they find themselves in. Statutory changes over the last two decades, and political priorities of the immigration

agency, have made deportation automatic upon conviction of aggravated felonies, with no discretionary relief. As *Nijhawan II* shows, the consequences of a conviction can even differ between the state of conviction and the state of removal proceedings for the same alien.[105]

On the first issue, whether a conviction under IRC §7206(1) can constitute an aggravated felony under INA §M(i), the Third, Fifth, and Ninth Circuits have come up with three mutually exclusive answers based on different lines of reasoning.

On the second issue, whether the immigration courts should be engaging in factfinding to determine if certain aspects of the INA's definition of an aggravated felony have been met, five circuits have held that they should not, while two circuits and the immigration agency have held that they should – in contradiction of this Court's rule in *Taylor* and *Shepard*.

These splits produce confusion for the aliens and the counsel who represent them. The distinctions are not merely academic for the thousands of aliens,

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[105] *See* the Petition for a Writ of Certiorari filed in *Nijhawan* v. *Holder*, 08-495, currently before this Court, explaining that under the law of the Second Circuit, where Nijhawan was convicted, he was *not* convicted of an aggravated felony, but under the law of the Third Circuit, where Nijhawan faced removal proceedings, he *was* found to have been convicted of an aggravated felony. Nijhawan Petition at 3.

many of them lawful permanent residents who risk losing their families and livelihoods by pleading guilty to crimes which, depending on the circuit, may or may not be aggravated felonies.

An alien negotiating a plea agreement, and a prosecutor who believes that the alien is deserving of a second chance in the United States, cannot know what plea arrangement will protect the alien from deportation and a permanent ban from his home in the United States if he can become an aggravated felon merely by crossing state lines into another circuit.

In the case of the second issue specifically, an alien cannot even assure protection from deportation through a perfectly crafted plea bargain (assuming such a thing exists) if the immigration courts are permitted to admit and consider evidence outside the record of conviction, and base a deportation on facts it has found but to which the alien did not plead guilty.

The splits also encourage the immigration service to forum shop, as the government has the ultimate power to transfer aliens in custody between circuits.

Because aggravated-felony determinations arise in the immigration courts so often, prompt resolution of these two circuit splits will have significant consequences across the country.

2. Well accepted rules of statutory construction weigh against the Fifth Circuit's determination that INA §M(i) includes convictions under IRC §7206(1).

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.[106] The very fact that there is a three-way circuit split regarding this issue attests to the fact that it is not.

If the text of a statute is not clear and unambiguous, the rules of statutory interpretation are applied, to assist the court in discerning Congress's intent.

The rule that the specific governs the general applies here, where "(M)(i) has a general application – the gamut of state and federal crimes involving fraud and deceit causing losses over $10,000 [and] Subsection (M)(ii) zeroes in on the crime of federal tax evasion, as described in section 7201."[107]

The Fifth Circuit below rejected the majority's analysis in *Lee* regarding the rule against surplusage.[108] It instead adopted the dissent's argument that Congress might have specified the inclusion of §7201

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[106] *Lee* v. *Ashcroft*, 368 F.3d 218, 222 (CA3 2004) (quotation and citation omitted).

[107] *Id.* at 222.

[108] Revised Op. at 5.

in §M(ii) to ensure that aliens convicted under that statute would not avoid deportation under §M(i).[109]

The majority in *Lee*, however, has the stronger argument. If §M(i) includes violations of §7206(1), then §M(ii) would become surplusage, because it is patently unlikely that a conviction for tax evasion under §7201 would not involve fraud or deceit, and thus fall under §M(i).

Finally, the Fifth Circuit "[did] not even attempt to explain away the sharp clash between its alien-hostile statutory construction and the traditional principle of construing uncertain statutes in favor of aliens."[110]

3. The Fifth Circuit erred in holding that the definition of an aggravated felony in INA §M(i) contains a non-element "collateral" factor.

This holding ignores the INA's requirement, in §237(a)(2)(A)(iii), that the alien be "convicted" of the enumerated generic crime, not that he have "committed" the elements making up that crime. This is a critical distinction, not because the word "convicted" must bear so much weight, but because this is the way in which Congress distinguished, from the universe of possible criminal acts, only those

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[109] *Id.* at 5, n.16.

[110] *Id.* at 18 (J. Dennis, dissenting).

aggravated felonies deserving of the banishment of deportation.

Further, the practical consequences of this are immense. Should this Court uphold the Fifth Circuit's finding regarding non-element "collateral" factors, the immigration courts will have virtually no guidance for identifying which words in the definition of an aggravated felony refer to criminal elements and which refer to non-element "collateral" factors. The Fifth Circuit stated simply that it "seems highly unlikely that Congress intended for [§M(i)] to apply only to convictions under statutes that included a monetary loss to a victim in excess of $10,000 as an element of the offense."[111]

4. The Fifth Circuit's new standard requires the immigration courts to engage in factfinding, which is wasteful, and which raises due process and fairness concerns.

The final, and perhaps most important reason, is to protect this Court's important concerns regarding duplicate factfinding by the immigration courts. As this Court explained in *Taylor*:

> [T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary,

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[111] *Id.* at 9-10.

the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.[112]

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[112] *Taylor*, 495 U.S. at 601-02.

Also, immigration courts have minimal standards for the admission of evidence, enabling evidence that would be inadmissible at trial to be used to determine an alien's deportability. This raises due process concerns, particularly where the consequences – permanent banishment – are so severe.

Factfinding by the immigration courts will result in a tremendous waste of judicial resources, from the agency to the circuit courts to this Court. Simply reaffirming this Court's holdings in *Taylor* and *Shepard* would preserve the efficiency, and fairness, of the aggravated-felony determination.

For each of these reasons, certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted so that the Court can resolve these two circuit splits.

Respectfully submitted,

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REVISED FEBRUARY 5, 2009
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60914

JOEL ARGUELLES-OLIVARES,
also known as, Joel Arguelles,

Petitioner,

v.

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals
File: A35 810 822 – El Paso

(Filed Apr. 22, 2008)

Before GARWOOD, DENNIS, and OWEN, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

The petitioner seeks review of a removal order, contending that his prior conviction for filing a false

federal tax return did not constitute a removable offense. We deny the petition for review.

I

Joel Arguelles-Olivares pleaded guilty to violating 26 U.S.C. § 7206(1) by knowingly filing a false tax return.[1] The Department of Homeland Security thereafter instituted removal proceedings, charging that Arguelles-Olivares was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(M). Subsection (M) defines an aggravated felony as "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000."[2] The Immigration Judge ordered Arguelles-Olivares removed, and the Board of Immigration Appeals affirmed the removal order.

Arguelles-Olivares contends that his tax offense is not an "aggravated felony" as defined by subsection (M)(i). He first asserts that subsection (M)(i) does not

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[1] 26 U.S.C. § 7206(1) (2000) (providing that one who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter" shall be guilty of a felony).

[2] 8 U.S.C. § 1101(a)(43)(M) (2000).

apply to any federal tax offenses because subsection (M)(ii) specifically identifies tax evasion, and only tax evasion, thereby reflecting congressional intent that no other tax offense qualifies as an aggravated felony. He additionally argues that, even if (M)(i) includes knowingly filing a false federal tax return, there is no competent evidence that the amount of loss was $10,000 or more.

II

We are not the first court to consider whether a federal tax offense other than tax evasion may constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(M). A divided panel of the Third Circuit concluded in *Lee v. Ashcroft* that it may not.[3] The Ninth Circuit reached the opposite conclusion in *Kawashima v. Gonzales*,[4] expressly rejecting the majority's reasoning in *Lee*. The arguments supporting each opposing view have been cogently considered by the Third Circuit in the majority and dissenting opinions in *Lee* and by the Ninth Circuit in *Kawashima*. We agree with then-Judge (now Justice) Alito's[5] and the Ninth Circuit's construction of subsection (43)(M)(i).

The text of subsection (43)(M)(i) is straightforward and unambiguous. "The term 'aggravated felony'

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[3] 368 F.3d 218, 220 (3d Cir. 2004).

[4] 503 F.3d 997, 1000-01 (9th Cir. 2007).

[5] *See Lee*, 368 F.3d at 225 (ALITO, J., dissenting).

means . . . an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ."[6] "Willfully" and knowingly signing and filing a false federal tax return unquestionably "involves fraud or deceit," and courts have concluded that the federal government is a "victim" within the meaning of (43)(M)(i).[7] The difficulty in construing (43)(M)(i) is the immediately succeeding subsection: "or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000."[8] The Third Circuit concluded that this more specific reference to tax evasion and the juxtaposition of the two subsections rendered subsection 43(M)(i) less than "plain and unambiguous."[9] That court "turn[ed] to the traditional tools of statutory construction," concluding that subsection (M)(ii) would be "mere surplusage" if subsection (M)(i) included tax offenses because "the government has not identified, and we are unable to envision" "a case where a conviction for tax evasion

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[6] 8 U.S.C. § 1101(a)(43)(M)(i).

[7] *See Kawashima*, 503 F.3d at 1000; *Balogun v. U.S. Attorney General*, 425 F.3d 1356, 1361 (11th Cir. 2005); *see also United States v. Fleming*, 128 F.3d 285, 288 (6th Cir. 1997) ("In tax fraud cases, we consider the United States Treasury the victim.") (citing *United States v. Wright*, 12 F.3d 70, 74 (6th Cir. 1993)).

[8] 8 U.S.C. § 1101(a)(43)(M)(ii).

[9] *Lee*, 368 F.3d at 222-23 (concluding that (M)(i) "does not have a plain and unambiguous meaning, at least not as applied to a conviction under section 7206(1) of the Internal Revenue Code.").

would not involve fraud or deceit," and that "the principle that the specific governs the general also favors the interpretation that subsection (M)(ii) identifies the only removable tax offense, tax evasion, while subsection (M)(i) does not apply to tax offenses."[10] The Third Circuit also reasoned that "for Congress to select tax evasion as the [only] 'aggravated' tax felony, justifying removal of an alien who committed it, while sparing lesser tax felons, is thoroughly consistent with the history and structure of criminal tax offenses."[11] In support of this conclusion, *Lee* cites the Supreme Court's decision in *Spies v. United States,*[12] characterizing tax evasion as the "'capstone' of tax law violations," the "'climax of this variety of sanctions'" and "'the *serious and inclusive* felony.'"[13] The Third Circuit decided that "Congress' intent is clear," and "[t]o the extent that any ambiguity lingers, we note that there is a 'long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'"[14]

We are persuaded, however, that Congress did not intend to single out tax evasion under 26 U.S.C. § 7201 for inclusion among aggravated felonies to the exclusion of all other tax felonies. We also conclude

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[10] *Id.* at 223-24.

[11] *Id.* at 224.

[12] 317 U.S. 492 (1943).

[13] *Lee*, 368 F.3d at 224 (quoting *Spies*, 317 U.S. at 497).

[14] *Id.* at 224-25 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

that subsection 43(M)(i) is unambiguous. Congress may well have seen subsection 43(M)(ii) as a necessary addition to subsection 43(M) since neither fraud nor deceit is a specific element of the crime of tax evasion under 26 U.S.C. § 7201,[15] as both the dissent in *Lee* and the Ninth Circuit recognized.[16] Moreover, it is difficult to discern why Congress would want only a violation of 26 U.S.C. § 7201 involving $10,000 or more to constitute an aggravated felony, but not tax felonies involving fraud and deceit and the same amount of loss to the Government fisc. Although the maximum term of imprisonment for a violation of § 7201 is five years, while the maximum prison term for a violation of § 7206 is three years, both are serious crimes carrying the same maximum fines.

We respectfully part company with *Lee* in this regard, including its reliance on *Spies v. United States*.[17] The Third Circuit reasoned that in *Spies* the Supreme

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[15] *See* 26 U.S.C. § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . .").

[16] *Kawashima v. Gonzales*, 503 F.3d 997, 1001 (9th Cir. 2007) ("Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated felony simply because 'fraud' and 'deceit' are not specific elements of that offense."); *Lee v. Ashcroft*, 368 F.3d 218, 227 (ALITO, J., dissenting) ("[T]he drafters might have been concerned that some courts would hold that tax evasion falls outside the scope of subsection M(i) because neither 'fraud' nor 'deceit' is a formal element of the offense.").

[17] 317 U.S. 492 (1943).

Court described the felony defined in former 26 U.S.C. § 145(b) as "the 'capstone' of tax law violations,"[18] and "[t]hus, for Congress to select tax evasion as the 'aggravated' tax felony, justifying removal of an alien who committed it, while sparing lesser tax felons, is thoroughly consistent with the history and structure of criminal tax offenses."[19] The *Spies* decision focused on "the acts necessary to make out the felony [under section 145(b) of the Revenue Act of 1936] and those which may make out the misdemeanor [under section 145(a)]."[20] The two provisions were similarly worded.[21] The Supreme Court's references to tax evasion as the "capstone" and the "climax of this variety of sanctions" must be considered in this context, as distinguishing the elements of the misdemeanor offense from those of the felony offense, not as comparing felony tax evasion with other felony tax offenses. Indeed, 26 U.S.C. § 7206 was not enacted until 1954, eleven years after *Spies* was decided in 1943.

The Supreme Court recently quoted the "capstone" statement that appears in *Spies* regarding 26 U.S.C. § 7201,[22] but also noted that "26 U.S.C.

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[18] *Lee v. Ashcroft*, 368 F.3d 218, 224 (3d Cir. 2004) (quoting *Spies*, 317 U.S. at 497).

[19] *Id.*

[20] *Spies*, 317 U.S. at 497.

[21] *See id.* at 493-94 nn.1-2.

[22] *Boulware v. United States*, 128 S.Ct. 1168, 1173 (2008) (" '[T]he capstone of [the] system of sanctions . . . calculated to

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§ 7206(1), criminalizing the willful filing of a tax return believed to be materially false" is "[a] related provision."[23] The Court further observed in *Boulware* that "it is arguable that 'the nature and character of the funds received can be critical in determining whether . . . § 7206(1) has been violated, [even if] proof of a tax deficiency [required under § 7201] is unnecessary.'"[24] The Court did not resolve the question, and of course, the Court was not construing 8 U.S.C. § 1101(a)(43)(M). But the Court's discussion does support our conclusion that the "capstone" argument advanced by the Third Circuit does not have the import that our sister court ascribes to it.

Other circuit courts have noted, correctly, that under some circumstances, a conviction for a violation of § 7206 may merge into a conviction under § 7201 as a lesser included offense.[25] But the corollary is that

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induce . . . fulfillment of every duty under the income tax law . . . ' is 26 U.S.C. § 7201, making it a felony willfully to 'attemp[t] in any manner to evade or defeat any tax imposed by' the Code.") (quoting *Spies*, 317 U.S. at 497).

[23] *Id.* at 1172 n.1.

[24] *Id.* at 1178 n.9.

[25] *See, e. g., United States v. Dale*, 991 F.2d 819, 858 (D.C. Cir. 1993) ("[U]nder appropriate circumstances, lesser section 7206 offenses merge with the 'capstone' prohibition of section 7201."); *United States v. Helmsley*, 941 F.2d 71, 99 (2d Cir. 1991) ("[W]here false returns 'were incidental step[s] in the consummation of the completed offense of attempted defeat or evasion of tax and as such . . . constituted a crime within [a] crime under the lesser included offense doctrine' then a conviction under Section 7206(1) for filing those false returns merges into a

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merger is not always appropriate. Section 7206 is a separate offense that is "separately punishable" from a violation of § 7201, unless there is also a violation of § 7201 and the § 7206 violation was incidental thereto.

There is no indication in the Tax Code that 26 U.S.C. § 7201, which addresses tax evasion, is the preferred means of prosecuting felony tax offenses. We cannot agree that Congress intended to exclude tax offenses involving fraud and deceit from 8 U.S.C. § 1101(a)(43)(M)(i) when it included a specific reference to 26 U.S.C. § 7201 in (43)(M)(ii).

Accordingly, a conviction under 26 U.S.C. § 7206(1) for filing a false tax return constitutes an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(M) if that offense involved a loss of $10,000 or more.

III

Arguelles-Olivares contends there is no evidence that his tax offense involved $10,000 or more because

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conviction under Section 7201 for the inclusive fraud of tax evasion.") (quoting *United States v. White*, 417 F.2d 89, 93-94 (2d Cir. 1969) (quoting *Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950))); *White*, 417 F.2d at 94 ("[W]here proof of wilfully attempted evasion under 7201 also proves, *as an incident to the wilful evasion*, the preparing and subscribing of a fraudulent return, the specific form of fraudulent conduct merges into the inclusive fraud charged under 7201. To cumulate penalties beyond the maximum authorized by 7201 is, therefore improper under these circumstances.").

the judgment of conviction does not mention the amount of actual loss. He asserts that it was error to rely on the Pre-Sentence Investigation Report (PSR), prepared in the tax offense proceedings, as evidence of the amount of loss in his immigration proceedings. Arguelles-Olivares asserts that the PSR must be excluded under the "categorical approach" of examining prior convictions and that the PSR's admission into evidence and reliance upon it was problematic for a number of other reasons. We first consider the pertinence of the "categorical approach."

A

The judgment in the tax offense prosecution does not reference any amount of loss, and the plea agreement in that criminal case was not made part of the record in the immigration proceedings. However, the PSR prepared in connection with Arguelles-Olivares' tax offense conviction states that Arguelles-Olivares' plea agreement determined the total amount of loss to be $248,335 for the years 1996-2000 and detailed the amounts of loss for each of those years.

This court had occasion to consider whether use of a PSR was proper in determining the amount of loss under 8 U.S.C. § 1101(a)(M)(i) in *James v. Gonzales*.[26] James had pled guilty to one count involving a transaction with a credit union in the amount of only

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[26] 464 F.3d 505, 510-11 (5th Cir. 2006).

$9,500.[27] We held that "[s]ince aiding and abetting bank fraud does not itself define a monetary threshold, we look beyond the statute to the record of conviction."[28] We cited the Third Circuit's decision in *Singh v. Ashcroft*[29] with approval for the proposition that we are not confined to the formal categorical approach of *Taylor v. United States*[30] when determining if an offense involved "'loss to the victim or victims [in excess of] $10,000.'"[31] As explained in this court's decision in *James* and the Third Circuit's decision in *Singh*, an amount of loss suffered by a victim is rarely an element of a criminal offense.[32] It seems

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[27] *Id.* at 506-07.

[28] *Id.* at 510.

[29] 383 F.3d 144, 159-61 (3d Cir. 2004).

[30] 495 U.S. 575 (1990).

[31] *James*, 464 F.3d at 510 n.26 ("'We turn now to the cases in which we did not confine ourselves to the formal categorical approach of *Taylor*. All three such cases . . . concerned 8 U.S.C. § 1101(a)(43)(M)(i). . . . In all three cases, the relevant criminal statute did not include a "loss greater than $10,000" element. Yet in these cases we expressly rested our holding on the underlying facts about the amount of loss involved. . . . In the case of the enumerating statute, a departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. The qualifier "in which the loss to the victim or victims exceeds $10,000" is the prototypical example – it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue.'" (quoting *Singh*, 383 F.3d at 159-61)).

[32] *See* n.9, *supra*; *see also Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 128 (2d Cir. 2007) ("Statutes of conviction rarely correlate precisely with statutes of removability – for example, few statutes criminalizing fraud enumerate distinct

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highly unlikely that Congress intended for 8 U.S.C. § 1101(a)(43)(M)(i) to apply only to convictions under statutes that included a monetary loss to a victim in excess of $10,000 as an element of the offense. For example, Congress itself has not included monetary loss to victims in defining a number of crimes involving fraud or deceit, such as bank fraud.[33] A conviction may be obtained for bank fraud under 18 U.S.C. § 1344 by proving the statutory elements. The amount of loss to the victim is a matter that is considered for sentencing purposes. As a matter of statutory construction, its seems that Congress intended for

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violations corresponding to the $10,000 loss amount required by the removability statute [8 U.S.C. § 1227(a)(2)(C)].").

[33] *See* 18 U.S.C. § 1344, which provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

See also id. § 152 (concealment of assets, false oaths and claims in bankruptcy); § 286 (conspiracy to defraud the Government with respect to claims); § 472 (uttering counterfeit obligations or securities); § 1010 (fraud and false statements in HUD and FHA transactions); and § 1341 (mail fraud).

the inquiry under 8 U.S.C. § 1227(a)(2)(A)(iii)[34] and § 1101(a)(43)(M) to be whether, as a categorical matter, the alien was convicted of "an offense . . . that involves fraud or deceit" as an element of the offense or that the offense necessarily entails fraud or deceit.[35] The requirement that the offense was one "in which the loss to the victim or victims exceeds $10,000"[36] is a factual matter to be determined from the record of conviction, but the amount of loss is not required to be an element of the conviction itself.

We do not quarrel with the dissent's observation that we have applied the categorical or modified categorical approach in the immigration context.[37] We have done so, however, when determining the nature or elements of the offense of conviction[38] but not the

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[34] 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that: "Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

[35] 8 U.S.C. § 1101(a)(43)(M)(i) (defining an aggravated felony to include "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.").

[36] *Id.*

[37] *See, e.g., James*, 464 F.3d at 508 & n.16 ("In determining whether an offense qualifies as an aggravated felony under the INA, we employ a categorical approach and look 'at the statute under which the alien was convicted rather than at the particular underlying facts,'" and recognizing "[a]n exception to the categorical approach exists 'when a statute is divisible into discrete subsections, violations of one or more of which would meet the criterion at issue.'") (quoting *Omari v. Gonzales*, 419 F.3d 303, 307, 308 (5th Cir. 2005)).

[38] *See, e.g., id.* at 508 (employing the categorical approach to determine "whether the offense of aiding and abetting bank

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amount of loss.[39] The categorical and modified categorical approaches are "standards for establishing the fact of prior convictions, turning on the basis of trial or plea."[40] They are the Supreme Court's "pragmatic conclusion about the best way to identify generic convictions . . . , while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction."[41] The modified categorical approach accordingly restricts the documents that may be consulted to determine whether a conviction was for a generic offense, and the focus is, properly, on the conviction.

When the amount of loss to a victim is not an element of an offense, the focus should not be limited to the conviction itself. The amount of loss is relevant in a criminal prosecution primarily, if not exclusively, to sentencing. When a tribunal subsequently examines, for collateral purposes like those here, the amount of loss resulting from an offense, the reason for applying the modified categorical approach does

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fraud necessarily entails, or has as at least one element, fraud or deceit").

[39] *See id.* at 510 ("Since aiding and abetting bank fraud does not itself define a monetary threshold, we look beyond the statute to the record of conviction.").

[40] *Shepard v. United States*, 544 U.S. 13, 19 (2005).

[41] *Id.* at 20.

not fully obtain.[42] Our inquiry should be guided by the statute that initiates that inquiry. The Immigration and Nationality Act provides that the government "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."[43] The Act further specifies, "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."[44] We

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[42] *See generally Conteh v. Gonzales*, 461 F.3d 45, 61 (1st Cir. 2006) (rejecting an argument that an amount of loss in a restitution order could not be considered in removal proceedings "because that amount was neither separately charged in the indictment nor found by the jury beyond a reasonable doubt," reasoning "[t]he premise of this argument – that the categorical approach should be transplanted root and branch from the criminal context into the civil removal context – is incorrect.").

[43] 8 U.S.C. § 1229a(c)(3)(A).

[44] *Id.* The INA also addresses proof of a conviction in § 1229a(c)(3)(B):

> In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
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> **(i)** An official record of judgment and conviction.
>
> **(ii)** An official record of plea, verdict, and sentence.
>
> **(iii)** A docket entry from court records that indicates the existence of the conviction.
>
> **(iv)** Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
>
> **(v)** An abstract of a record of conviction prepared by the court in which the conviction was entered,

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should determine, therefore, whether there was clear and convincing evidence that Arguelles-Olivares's prior conviction involved an amount of loss greater than $10,000 and whether the evidence establishing that the conviction involved such a loss was reasonable, substantial, and probative. These are the standards that apply in determining whether the BIA erred in relying on the PSR to determine the amount of loss.

We recognize that there is disagreement among the circuit courts as to how the amount of loss involved in a prior criminal conviction may be ascertained in civil removal proceedings. The Ninth Circuit has held that the amount of loss must be admitted by a defendant or found by the trier of fact in the prior criminal prosecution.[45] Similarly, the Second Circuit

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or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

[45] *See Li v. Ashcroft*, 389 F.3d 892, 897 (9th Cir. 2004) (holding that "if the record of conviction demonstrates that the jury in

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"permit[s] the BIA to remove only those aliens who have actually or necessarily pleaded [in the underlying criminal proceedings] to the elements of a removable offense," including the greater-than-$10,000-loss requirement.[46] Our court has construed the statute differently, and we believe correctly, in *James*.[47]

Based on the facts of this case, there is clear and convincing evidence that the PSR accurately reflected the amount of loss. An addendum to the PSR reflects that Arguelles-Olivares had no objections to the PSR. The PSR additionally states that a probation officer interviewed Arguelles-Olivares regarding the report and that Arguelles-Olivares agreed with the chart in the report showing the tax losses by year, including a loss of $75,982 for 1999. The district court adopted the PSR's factual findings. Arguelles-Olivares does not dispute that he agreed to the facts set forth in the PSR including, specifically, the fact that the amounts of loss for each year were part of the plea agreement and that they totaled in excess of $10,000 for each year. Arguelles-Olivares's failure to object to these facts in the PSR, his admission that they were correct, and the district court's adoption of these facts

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Petitioner's case actually found that Petitioner caused, or intended to cause, a loss to the government of more than $10,000, the modified categorical approach will be satisfied," but not otherwise).

[46] *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 133 (2d Cir. 2007).

[47] *James v. Gonzales*, 464 F.3d 505 (5th Cir. 2006).

is clear and convincing evidence that the loss to the government was in excess of $10,000.

The dissent cites several decisions in support of its conclusion that the BIA cannot consider a PSR in determining the amount of loss. The first decision on which the dissent relies is *Larin-Ulloa v. Gonzales* from this court.[48] But that case had nothing to do with an amount of loss. The issue was whether a prior Kansas conviction was a crime of violence within the meaning of 18 U.S.C. § 16(b), specifically, whether "intentionally causing physical contact with another person with a deadly weapon in a rude, insulting or angry manner clearly involves a substantial risk that physical force against another person may be used."[49]

The dissent cites the Second Circuit's decision in *Dulal-Whiteway v. U.S. Department of Homeland Security,* but as discussed above, that circuit has chosen to treat the amount of loss essentially as an element of the underlying conviction. This circuit has not.

The Eleventh Circuit held in *Obasohan v. U.S. Attorney General,*[50] also cited by the dissent, that an amount of loss must be charged and proven or admitted by the defendant in the underlying criminal proceedings. Although the breadth of that decision is not entirely clear, that court would apparently permit

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[48] 462 F.3d 456 (5th Cir. 2006).

[49] *Id.* at 465.

[50] 479 F.3d 785, 791 (11th Cir. 2007).

the BIA to rely on a restitution order if a defendant admitted the amount of loss.[51] The First Circuit held in *Conteh v. Gonzales,* cited by the dissent, that the BIA could rely on a restitution order to determine the amount of loss when "the district court made an explicit finding of the amount of loss as part of its final judgment,"[52] even though that finding may have been based in part on facts in the PSR.[53]

In the final analysis, our circuit's precedent is clear, and with respect, we disagree with the dissent. The PSR could be considered under the circumstances presented here, particularly given that Arguelles-Olivares admitted in the underlying criminal proceedings that the amounts of loss reflected in the PSR were correct.

B

Arguelles-Olivares contends that there must be proof that the amount of loss exceeded $10,000 in a

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[51] *Id.* at 790 ("There was no basis in this record from which the IJ could have found by 'clear, unequivocal and convincing' evidence that the restitution order was based on convicted or admitted conduct.").

[52] 461 F.3d 45, 62 (1st Cir. 2006).

[53] *Id.* at n.10 ("It is of no consequence that this finding may, in part, have reflected information contained in the PSI Report. After all, findings incorporated in the final judgment routinely are predicated on evidence outside the formal record of conviction.").

single tax year. Even assuming *arguendo* that this is a correct proposition of law, the threshold was met.

He asserts that the PSR was inadmissible because removal proceedings are prosecutorial in nature and that use of a PSR is incompatable with the purpose of the report as a sentencing and correctional tool. He additionally asserts that the PSR is confidential and cannot be accessed without leave of court. Arguelles-Olivares made no attempt during the immigration proceedings to seek an injunction or order from the district court to maintain the confidentiality of the PSR. He did not identify any provisions of the PSR that would jeopardize his own privacy or the government's interest in maintaining the trust of third-party witnesses by keeping the PSR confidential. There was no abuse of discretion in admitting the PSR.

The record contains evidence that supports the BIA's conclusion that Arguelles-Olivares is an aggravated felon, and we will not vacate that determination.

* * *

We DENY the petition for review.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent and would grant the alien's petition for review. In my opinion, the majority incorrectly decides two important immigration law issues, one of them *res nova* in this Circuit

When this opinion was originally issued, the majority joined a panel of the Ninth Circuit in splitting from the Third Circuit on whether filing a false tax return in violation of 26 U.S.C. § 7206(1) can constitute an aggravated felony for the purpose of removing an alien from this country. Since then, the Ninth Circuit has withdrawn its original opinion in *Kawashima I*, *Kawashima v. Gonzales*, 503 F.3d 997 (9th Cir. 2007), and substituted a new opinion, *Kawashima II*, *Kawashima v. Gonzales*, 530 F.3d 1111 (9th Cir. 2008). *Kawashima II* holds that conviction under § 7206(1) can never be an aggravated felony within the meaning of 8 U.S.C. §1101(a)(43)(M) and thus can never, alone, give rise to deportability under 8 U.S.C. § 1227(a)(2)(A).[1] Although the Ninth Circuit's new

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[1] *Kawashima I*, in reasoning similar to that relied on by the majority in this opinion, held that filing a false tax return could be an aggravated felony for purposes of determining an alien's removability. A day after *Kawashima I* was released, an *en banc* panel of the Ninth Circuit decided *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), in which it held that the modified categorical approach could only be used in determining whether an offense was an aggravated felony when "the particular elements in the crime of conviction are broader than the generic crime." 503 F.3d at 1073. When the crime of conviction is missing an element of the generic crime, the Ninth Circuit held,

(Continued on following page)

decision is not based on reasoning that impacts that of the majority opinion, its revision nevertheless leaves this Circuit now standing alone in holding that filing a false tax return can be an aggravated felony for purposes of removal. The lack of detailed analysis in the majority's opinion on this matter is now thus all the more troubling. The majority gives no weight whatever to the INA's designation of tax evasion as the sole tax offense explicitly named as an "aggravated felony"; the majority does not even attempt to explain away the sharp clash between its alien-hostile statutory construction and the traditional principle of construing uncertain statues in favor of aliens.

Second, the majority refuses to follow our circuit precedents that have consistently applied the Supreme Court's *Taylor-Shepard* "modified categorical

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the crime of conviction can "never be narrowed to conform to the generic crime because the jury is not required . . . to find all the elements of the generic crime." *Id.* In such cases, the modified categorical approach cannot be used and record of conviction cannot be consulted at all. *Id.* In the Kawashimas' case, since the Ninth Circuit had consistently held that the $10,000 requirement was an element of the generic crime of (M)(i), and §§ 7206(1) and 7201 do not require the government to prove the amount of loss, the crimes of conviction in that case could never be narrowed to conform to the generic crime, and since the court was not free under *Navarro-Lopez* to consult the record of conviction to determine the amount of loss caused by the Kawashimas' actions the government had not met its burden of proof and the Kawashimas were not removable. *Kawashima II*, 530 F.3d at 1118.

approach" in removal cases; instead, it approves the BIA's looking outside the record of the alien's conviction to find an aggravated felony based upon a paper trial of underlying facts contained in his PSR. In so doing, the majority creates a circuit split from the four circuits unanimously holding that such use of PSRs is improper under the *Taylor-Shepard* modified categorical approach; and it disregards the numerous decisions of our own prior panels consistently applying the *Taylor-Shepard* methodology in sentencing cases. The majority's second decision is particularly unfortunate because it exposes aliens in this Circuit to the potential of unfair practices, inequality of justice, and deportations based on constructive paper trials without juries rather than on record so judicial convictions.

1.

A.

Joel Arguelles-Olivares was born March 13, 1957, in Mexico. He immigrated to the United States more than thirty years ago and has been a Permanent Resident Alien since April 6, 1977.[2] Since then, he has lived in Houston, Texas; Sugarland, Texas; New York City; Round Rock, Texas; Austin, Texas; Hutto, Texas; and Pflugerville, Texas, where he currently resides.

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[2] Arguelles has two sisters and two brothers, all of whom are naturalized citizens living in Texas. His mother, a United States citizen, lives in Mission, Texas.

After moving to the United States, Arguelles lived with Laverne Clancy for thirteen years. Together they have one daughter, who is currently a student at Baylor University in Waco, Texas. In 1993, Arguelles married Pearl Lavenia Whidden Pfeffer. Together they have two children, ages five and two, who live with them in their three-bedroom, one-story house. Mrs. Arguelles has two children from a previous marriage, one of whom lives with them.

Since 1978, Arguelles has been a self-employed masonry contractor. The record indicates that Arguelles has been financially successful in that capacity and that he regularly employs a number of individuals. Although the details of the size of his work force and his employees' wages or salaries are not disclosed in the record, the PSR states that in the 2001 tax year he reported a taxable income of $459,390 upon which he paid the correct amount of $175,012 in income taxes.

B.

On April 7, 2003, Arguelles was charged by criminal information in the United States District Court for the Western District of Texas with one count of filing a false income tax return for the 1999 tax year in violation of 26 U.S.C. § 7206(1). On May 1, 2003, Arguelles pleaded guilty in accordance with a written Plea Agreement to the charge against him. He was then sentenced on July 8, 2003, to a term of twenty-one months of imprisonment, to be followed

by a supervised release term of one year, but he was not fined or ordered to pay any restitution.

On account of this conviction, the Department of Homeland Security ("DHS") initiated removal proceedings against Arguelles pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(M). During the proceedings, Arguelles admitted to all of the allegations contained in the DHS's Notice to Appear except that he specifically denied that his conviction resulted in a loss to the victim, in this case the Government, of more than $10,000. The DHS did not introduce the written Plea Agreement into the record of this removal proceeding in order to prove that the amount of loss exceeded $10,000.[3] The DHS did file the charging document, a criminal information, and the judgment of conviction into the record, but none of these instruments discloses how much Arguelles underpaid his 1999 federal income taxes. The criminal information simply states that he underpaid his taxes by a substantial amount. The judgment of conviction merely adjudges him guilty of

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[3] The DHS does not explain why it failed to introduce this crucial document into evidence. If the written Plea Agreement discloses clearly that Arguelles underpaid his 1999 taxes by more than $10,000, the DHS's failure to file it has caused this court to expend time and effort unnecessarily on the appeal, the oral argument and the opinion writing on this issue. If the Plea Agreement does not contain clear evidence to this effect, then a serious question is raised as to whether the DHS has dealt fairly with Arguelles and honorably with this court.

violating 26 U.S.C. "7205(1)"[4] by "Making a Subscribing a (sic) False Return" on April 4, 2000. The only document in the record that provides any indication of how much Arguelles underpaid his 1999 federal income taxes is the PSR.[5] Arguelles objected to the inclusion of the PSR into the record of his immigration proceedings, but the IJ admitted it and both the IJ and the BIA relied on statements in the PSR to conclude that Arguelles's conviction involved a loss amount that exceeded $10,000. Both the IJ and the BIA also rejected Arguelles's argument that a conviction for filing a false tax return under 26 U.S.C. § 7206(1) cannot qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

Accordingly, the IJ deemed Arguelles removable for being convicted of an aggravated felony and ordered Arguelles removed to Mexico. The BIA affirmed the removal order. As a consequence of being removed

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[4] This is apparently a typographical error. Section 7206(1) was evidently intended.

[5] The PSR contains the following statements concerning the alleged loss amount: "On May 1, 2003, the defendant pled guilty in accordance with a written Plea Agreement, wherein the Government and the defendant agree that the tax loss for sentencing purposes will include the loss from tax years 1996 through 2000 for a total tax loss of $248,335."; "The IRS determined that the defendant owes $248,335 in unpaid taxes."; and "Restitution in the amount of $248,335 is outstanding. . . ." The PSR also contains a table purporting to show the additional amount of tax that Arguelles-Olivares owed for tax years 1996-2000, which totaled $248,335, including $75,982 for tax year 1999.

for conviction of an aggravated felony, Arguelles will be permanently barred from re-entry to the United States. *See* 8 U.S.C. § 1182(a)(9)(A)(i)-(ii).

2.

In his petition for review, Arguelles re-urges his argument that no conviction under 8 U.S.C. § 7206(1) for filing a false tax return can qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(M). When this court released the opinion in the present case, the only two other circuits to have previously considered the issue – the Ninth and the Third – had come to different conclusions. *Compare Kawashima v. Gonzales,* 503 F.3d 997 (9th Cir. 2007) (*Kawashima I*) (holding that a violation of § 7206(1) in which the tax loss to the government exceeds $10,000 constitutes an aggravated felony under § 1101(a)(43)(M)(i)), *withdrawn with Ki Se Lee v. Ashcroft,* 368 F.3d 218 (3d Cir. 2004) (reaching the opposite conclusion), *but see id.* at 225 (Alito, J., dissenting). Now that the Ninth Circuit has withdrawn *Kawashima I*, and substituted for it *Kawashima v. Gonzales*, 530 F.3d 1111 (9th Cir. 2008) (*Kawashima II*), this Circuit is alone on one side of a circuit split, with the Third Circuit on the other. In my view, we need not have reached the issue of whether filing a false tax return, in addition to tax evasion, can constitute an aggravated felony for purposes of removal in order to resolve the case. Nevertheless I believe the Third Circuit's reasoning in *Ki Se Lee* persuasively demonstrates that in enacting § 101(a)(43)(M)(i) Congress intended to single out tax evasion as the only tax crime meriting removability.

The Third Circuit's decision is well-reasoned and fully comports with the traditional tools used in the holistic endeavor of statutory construction. The majority in the present case appears to abandon these well-established basic principles in reaching the opposite result.

Congress has defined an aggravated felony for the purposes of removability in pertinent part as:

> (M) an offense that –
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. § 1101(a)(43)(M). As explained in great detail by the Third Circuit majority in *Ki Se Lee,* the juxtaposition of subsections (M)(i) and (M)(ii) – one a general provision encompassing offenses involving "fraud or deceit," and one a specific provision focused solely on federal tax evasion, both enacted simultaneously in 1996 – suggests, at the very least, an ambiguity as to whether other tax offenses, such as violations of § 7206(1), are covered under the more general (M)(i). *See Ki Se Lee*, 368 F.3d at 222-25. The majority's brief analysis of the relationship between M(i) and M(ii) is unpersuasive to me. In particular, I find puzzling the majority's attempt, unsupported by any authority whatever, to cabin the language used by Justice

Jackson in *Spies v. United States,* 317 U.S. 492, 497 (1943), and discussed by the majority in *Ki Se Lee,* 368 F.3d at 224, as relevant only in the context of violations of the Revenue Act of 1936. *Spies* has not been interpreted so narrowly. *See Boulware v. United States,* 128 S. Ct. 1168, 1173 (2008) ("'[T]he capstone of [the] system of sanctions . . . calculated to induce . . . fulfillment of every duty under the income tax law,' *Spies v. United States,* 317 U.S. 492, 497 (1943), is 26 U.S.C. § 7201, making it a felony willfully to 'attemp[t] in any manner to evade or defeat any tax imposed by' the Code."); *United States v. Dale,* 991 F.2d 819, 858 (D.C. Cir. 1993) (stating that "[t]he Internal Revenue Service sets out a comprehensive scheme prohibiting and punishing tax fraud; section 7201, the 'evasion' provision has been called the 'capstone' of this scheme" and holding that convictions under § 7206 may "merge, as lesser included offenses, into the 'capstone' § 7201 tax evasion convictions"); *United States v. Helmsley,* 941 F.2d 71, 99 (2d Cir. 1991) (calling § 7201 the "'capstone' of the comprehensive statutory scheme prohibiting and punishing federal tax fraud" and holding that a conviction under § 7206(1) for filing false returns may merge into a conviction under § 7201 "for the inclusive fraud of tax evasion"). This circuit itself has recognized explicitly that tax evasion is "the most serious of all tax offenses." *Escobar v. United States*, 388 F.2d 661, 665 (1968).

In addition, the gravity of tax evasion as compared to the relatively less serious offense of filing a

false tax return is reflected in judicial understandings of the goals of §§ 7206(1) and 7201 – § 7206(1) is in essence a perjury statute, while § 7201 addresses tax evasion. The crimes have different elements and involve different levels of blameworthiness.[6] "Unlike sections 7201 or 7203, section 7206(1) requires the prosecution to prove neither intent to evade payment of taxes nor the existence of any taxable income. . . . [T]he section requires simply that the government prove that defendant willfully made and subscribed a return, that it contained a written declaration that it was made under penalties of perjury, and that defendant did not believe the return to be true and correct as to every material matter." *United States v. Taylor*, 574 F.2d 232, 234 (5th Cir. 1978). *See also, e.g., United States v. Beasley*, 519 F.2d 233, 245 (5th Cir. 1975) (noting that the purpose of § 7206(1) is to "impose penalties for perjury upon those who willfully falsify their returns regardless of the tax consequences of the falsehood" while the purpose of § 7201 is to prosecute tax evasion), *vacated and remanded on other grounds, Beasley v. United States*, 425 U.S. 956

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[6] To establish a violation of § 7206(1) the government must prove that: 1) the accused willfully made and subscribed to a tax return, 2) the return contained a written declaration that it was made under penalties of perjury, and 3) the accused did not believe that the return was true as to every material matter. *United States v. Loe*, 262 F.3d 427, 435 (5th Cir. 2001). To establish a violation of § 7201 the government must prove: 1) a tax deficiency, 2) an affirmative act constituting an evasion or attempted evasion of the tax, and 3) willfulness. *United States v. Hildenbrand*, 527 F.3d 466, 479 (5th Cir. 2008).

(1976); *United States v. Tarwater*, 308 F.3d 494, 506 (6th Cir. 2002) (characterizing § 7206(1) as a "perjury statute"); *United States v. Hajecate*, 683 F.2d 894, 902 (5th Cir. 1982) (calling § 7206(1) "the perjury statute of the [Internal Revenue Code]"). There is a significant difference in culpability and potential harm to the government between § 7201's element of an affirmative act constituting an attempted evasion or defeat of the tax or its payment and § 7206(1)'s element of making and subscribing a return which the person does not believe to be materially true and correct. Congress chose to criminally punish tax evasion more severely than filing a false return; and it is reasonable to infer that Congress intended that the stigma of removal attach to tax evasion but not to false return filing.

Furthermore, the Supreme Court and this Circuit have consistently recognized "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); *Martinez v. Mukasey*, 519 F.3d 532, 544 (5th Cir. 2008) (quoting *Cardoza-Fonseca* and explaining that "[t]his canon of construction, comparable to the

rule of lenity in criminal cases, is based on the drastic nature of removal"); *Banda-Ortiz v. Gonzales,* 445 F.3d 387, 396 (5th Cir. 2006) (Smith, J., dissenting) ("Though the majority finds this weight of authority insufficient, it might at least, out of comity, acknowledge the merit of the competing position by applying the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'").

In light of the weighty matters of statutory history, construction, and interpretation involved I believe, at minimum, this issue requires a more encompassing analysis than that offered in the majority opinion – particularly now that this Circuit stands alone on this aggravated felony issue, which has such serious consequences for aliens and their families.

3.

Title 8, Section 1227(a)(2)(A)(iii) of the United States Code renders removable "[a]ny alien who is convicted of an aggravated felony at any time after admission." Title 8, Section 1101(a)(43)(M)(i) of the United States Code defines "aggravated felony" as, *inter alia,* an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Arguelles was convicted of filing a false tax return in violation of 26 U.S.C. § 7206(1), which provides:

> Any person who . . . [w]illfully makes and subscribes any return, statement, or other

> document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Assuming *arguendo* the applicability of 8 U.S.C. § 1101(a)(43)(M)(i) to violations of 26 U.S.C. § 7206(1), Arguelles contends that his record of conviction fails to establish that the loss to the victim of his crime exceeded $10,000. In particular, he argues that it was error for the IJ to consult the PSR, which indicated that the loss to his victim, the Government, was $75,982, because it should not have been considered part of his record of conviction. I agree that relying upon these materials to prove that Arguelles was convicted of causing a loss greater than $10,000 violated the modified categorical approach to determining aliens' removability based on criminal convictions.

My conclusion necessarily follows from our Circuit's precedent in this area. We have stated that "[t]o determine whether an alien's guilty plea conviction constitutes an aggravated felony for removal purposes, we apply a 'categorical approach,' under which we refer only to the statutory definition of the crime for which the alien was convicted (rather than attempt to reconstruct the concrete facts of the actual

criminal offense) and ask whether that legislatively-defined offense necessarily fits within the INA definition of an aggravated felony." *Larin-Ulloa v. Gonzales,* 462 F.3d 456, 463 (5th Cir. 2006); *see also Fortes v. Mukasey,* No. 06-61002, 2007 WL 4259302, at *3 (5th Cir. Dec. 5, 2007) (unpublished); *Omari v. Gonzales,* 419 F.3d 303, 307 (5th Cir. 2005) (citing *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000)); *Nguyen v. Ashcroft*, 366 F.3d 386, 388 (5th Cir. 2004). We do not consider the underlying facts that resulted in the alien's conviction. *Fortes,* 2007 WL 4259302, at *3 (citing *Larin-Ulloa*, 462 F.3d at 463).

We adopted this methodology in the immigration context because of its analogous roots in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States,* 544 U.S. 13 (2005), two sentencing cases in which the Supreme Court described the basic structure and underlying rationales of the modified categorical approach. *See Larin-Ulloa,* 462 F.3d at 463-64; *Dulal-Whiteway v. Dep't of Homeland Sec.*, 501 F.3d 116, 124 (2nd Cir. 2007). Among the considerations that led the *Taylor* court to conclude that a categorical approach to prior convictions was necessary were concerns about the practical difficulties and fairness problems that would arise if courts were permitted to consider the facts behind prior convictions.[7] The *Taylor* court noted that a fact-based

[7] The *Taylor* court also emphasized that the language of 18 U.S.C. § 924(e) supported a categorical approach because its sentence enhancement provisions are triggered by prior convictions

(Continued on following page)

approach to prior convictions would potentially require federal courts to relitigate a defendant's prior conviction in any case where the government alleged that the defendant's actual conduct fit the definition of a predicate offense. *Taylor,* 495 U.S. at 601; *see also Tokatly v. Ashcroft,* 371 F.3d 613, 621 (9th Cir. 2004) (noting the "fundamental principle" that "in determining whether a prior conviction constitutes a predicate offense, we must avoid 'the enormous problems of re-litigating past convictions, especially in cases where the defendant pleads guilty and there is no record of the underlying facts'") (quoting *United States v. Castillo-Rivera,* 244 F.3d 1020, 1022 (9th Cir. 2001)). The *Taylor* court also recognized the unfairness that could result if a factual approach was applied to prior guilty plea convictions:

> [I]n cases where the defendant pleaded guilty, there is often no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

Taylor, 495 U.S. at 601-02.

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and not by the fact that the person has previously committed an offense. *See Taylor,* 495 U.S. at 601. This rationale applies equally to the INA's provision concerning aggravated felonies. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *Larin-Ulloa,* 462 F.3d at 464 n.8.

However, as we explained in *Larin-Ulloa,* the categorical approach is not absolute. 462 F.3d at 464. "If the statute of conviction defines multiple offenses, at least one of which does not describe an aggravated felony, we apply a modified categorical approach, under which we may also examine certain additional documents (if contained in the record framing the guilty plea conviction) to determine whether the conviction was 'necessarily' for a particular crime defined by the statute that meets the aggravated felony criterion." *Id.* (citing *Shepard v. United States,* 544 U.S. at 13, 20-21, 26; *Omari,* 419 F.3d at 308); *see also Dickson v. Ashcroft,* 346 F.3d 44, 48-49 (2d Cir. 2003) ("In reviewing a conviction under a divisible statute, the categorical approach permits reference to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal."). In the case of guilty plea convictions under such a divisible statute, we may consider, in addition to the language of the statute, the "'charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *Omar,* 419 F.3d at 308 (quoting *Shepard,* 544 U.S. at 16). The use of these documents is permitted because they are considered sufficiently conclusive and reliable to establish the facts to which the alien actually pleaded guilty. *See Shepard,* 544 U.S. at 23 (stating that evidence of facts should be "confined to records of the convicting court approaching the certainty of the record of conviction"). "Documents not of that kind,

including police reports and complaint applications, may not be considered." *Omari,* 419 F.3d at 308. If the documents that we may consider under the modified categorical approach are insufficient to establish that the petitioner was necessarily convicted of an aggravated felony, we must find that "the government has not met its burden of proving that the conduct for which the petitioner was convicted constitutes a predicate offense, and the conviction may not be used as a basis for removal." *Tokatly,* 371 F.3d at 620, *see Omari,* 419 F.3d at 309 (same).

The analogous statutory structures in the sentencing and deportation contexts, as well as the reasoning of *Taylor* and *Shepard,* justify the use of the categorical approach to determine removability *vel non. See Dulal-Whiteway,* 501 F.3d at 125 (citing *Ming Lam Sui v. INS,* 250 F.3d 105, 116-17 (2d Cir. 2001)): "[L]ike the burglary sentencing enhancement, the Immigration and Nationality Act ("INA"), 8 U.S.C § 1227(a)(2)(A)(iii), rendered removable 'an alien who has been 'convicted' of an aggravated felony, not one who has 'committed' an aggravated felony.'" *Id.* (citing *Sui*, 250 F.3d at 117). Moreover, "nothing in the legislative history suggested a factfinding role for the BIA in ascertaining whether an alien had committed an aggravated felony, just as, in Taylor, nothing suggested such a role for the sentencing court in evaluating the factual basis of a prior burglary conviction." *Id.* at 126. Further, the practical evidentiary difficulties and potential unfairness asscciated with looking behind the offense of conviction are "no less daunting"

in the immigration than in the sentencing context. *Id.* Finally, given the exception in *Taylor*, when a statute of conviction criminalizes both conduct that would constitute a removable offense and conduct that would not, IJs might appropriately consult an indictment or jury instructions to determine the basis of an alien's conviction, but IJs cannot look behind the record of conviction to reach their own determination as to whether the underlying facts constitute a conviction for an aggravated felony. *See id.*; *Sui,* 250 F.3d at 117-18 (quoting *Lewis v. INS,* 194 F.3d 539, 543 (4th Cir. 1999)). Accordingly, like the Second Circuit, *see id.,* this Court has applied the modified categorical approach as a two-step inquiry: first, we determine if the statute describes multiple offenses such that some categories of proscribed conduct render an alien removable and some do not; second, we consult the record of conviction to ascertain the category of conduct of which the alien was convicted. *Larin-Ulloa*, 462 F.3d at 467-68; *Omari*, 419 F.3d at 308.

Assuming *arguendo* that filing a false tax return can qualify as an aggravated felony under M(i), 26 U.S.C. § 7206(1), the statute criminalizing filing a false tax return, would then describe offenses that both could and could not give rise to removability. Although § 7206(1) applies when the perpetrator files a tax return that he does not believe to be true and correct, under 8 U.S.C. § 1101(a)(43)(M)(i), such action would be a removable offense only when the conviction involves a loss to the victim or victims in excess of $10,000. Thus, § 7206(1) would provide

grounds for some convictions that do not authorize removal – those involving loss to the victim or victims not exceeding $10,000, and some convictions that do – those involving loss to the victim or victims that exceeds $10,000. Accordingly, in the present case we must consult the record of conviction to determine, if possible, whether Arguelles's conviction involves loss to the victim or victims in excess of $10,000.

Under the *Taylor-Shepard* modified categorical approach, which our circuit's removal precedents have heretofore followed, we have concluded that the BIA's consultation of the PSR as proof of the specific facts underlying the petitioner's prior conviction was improper. *See Larin-Ulloa*, 462 F.3d at 468; *cf. Omari*, 419 F.3d at 308 (PSR not considered part of the record of conviction). In *Larin-Ulloa*, we held that a "sentencing factor notation is not the type of documentary evidence to which this court or the BIA may refer, under the modified categorical approach as prescribed by Shepard, to determine the nature of an alien's guilty plea conviction." 462 F.3d at 468. We further concluded that "[u]nlike the charging document, the guilty plea, or the factual basis for the plea confirmed by the defendant, sentencing reasons and factors do not simply define the charge and the defendant's guilty plea, but, instead, frequently refer to facts neither alleged nor admitted in court." *Id.* at 468-69. Other than for its possible use to prove the existence

of a conviction, *see* 8 U.S.C. § 1229a(c)(3)(B)(vi),[8] such a report simply is not a part of the formal record of conviction. *Id.* at 468. This conclusion is further supported by our sentencing cases, in which we have consistently said that a district court may not rely on

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[8] 8 Section 1229a(c)(3)(B) provides:

> (B) Proof of convictions. In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
>
> (i) An official record of judgment and conviction.
>
> (ii) An official record of plea, verdict, and sentence.
>
> (iii) A docket entry from court records that indicates the existence of the conviction.
>
> (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
>
> (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
>
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
>
> (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

the PSR's characterization of the offense for enhancement purposes. *See United States v. Bonilla-Mungia*, 422 F.3d 316, 320-21 (5th Cir. 2005) (holding that *Shepard* does not permit a court to consider factual narrative in probation officer's PSR), *cert. denied*, 546 U.S. 1070 (2005); *United States v. Garza-Lopez*, 410 F.3d 268, 273-74 (5th Cir. 2005) (same), *cert. denied*, 546 U.S. 919 (2005); *cf. Shepard*, 544 U.S. at 20-23 (precluding the use of a police report to prove the underlying facts of the putative predicate offense). Moreover, that Arguelles may not have objected to the PSR's factual findings[9] and the district court adopted them for sentencing purposes are irrelevant to determining whether Arguelles's conviction was for removable, as opposed to non-removable, conduct because the PSR "typically describes conduct that demonstrates the commission of an offense even if the alien was never *convicted* for that activity" and may contain inaccurate, unproven, and inadmissible facts.[10] *Dickson*, 346 F.3d at 54 (emphasis in original).

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[9] The majority's characterization of Arguelles as having agreed to certain facts relating to the loss amount for the 1999 tax year is supported only by self-serving references to the probation officer's statements in the PSR and its addendum. The majority does not – because it cannot – point to any statement in the record of conviction by which Arguelles admitted to or failed to object to the factual statements contained in the PSR, as the Government did not include a transcript of the plea colloquy or the sentencing hearing in the immigration record, in addition to not including the Factual Basis and Plea Agreement.

[10] Here, the PSR's "proof" of Arguelles's 1999 tax year liability amounts to nothing more than an unsourced and

(Continued on following page)

Accordingly, the government's argument that a PSR is properly considered among the record of conviction materials, such that the IJ could rely upon the loss amount it described, is foreclosed by *Larin-Ulloa*. *Cf. Omani*, 419 F.3d at 308 (PSR not considered part of the record of conviction). The IJ therefore improperly relied on statements set forth in Arguelles's PSR to establish the loss amount for the 1999 tax year. *Accord Dulal-Whiteway*, 501 F.3d at 129 ("The government's argument that a PSR is properly considered among [the modified categorical approach's permissible] materials, such that the IJ could rely upon the loss amount it described, is foreclosed by *Dickson* [*v. Ashcroft*, 346 F.3d 44, 52-55 (2d Cir. 2003)], where we rejected a virtually identical claim"); *Obasohan v. United States Attorney General*, 479 F.3d 785, 789-91 (11th Cir. 2007) (holding that an IJ was not entitled to rely on loss amounts that were alleged only in a PSR); *Conteh v. Gonzales*, 461 F.3d 45, 58 (1st Cir. 2006) ("We reject the government's argument: the BIA's consultation of the PSI Report as proof of the specific facts underlying the petitioner's prior conviction was improper. Other than for its possible use to prove the *existence* of a conviction, such a report simply is not a part of the formal rec ord of conviction." (emphasis in original) (citations

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unverified chart that is not accompanied by IRS documents or raw data that provide any indication as to how these numbers were calculated or even who specifically performed the calculations.

omitted)); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir. 2003) (holding that a PSR is "insufficient evidence" to show that an alien's conviction constitutes an aggravated felony) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc)).[11]

Finally, the majority's holding is not, as the majority states, compelled by *James v. Gonzalez*, 464 F.3d 505 (5th Cir. 2006). James, in my opinion, does not represent a clear holding on anything in particular, but should be restricted as precedent to its facts and reconsidered *en banc*. There, the panel affirmed the BIA's determination that the loss to

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[11] In a strong dissent to a recent Third Circuit decision allowing consultation of a sentencing stipulation to establish M(i)'s $10,000 loss requirement, Judge Stapleton noted that "'[t]his Court has never before found an alien deportable for conduct the alien was neither convicted of nor pled guilty to; the Court's approach, therefore, will significantly expand the reach of the INA's 'aggravated felony' provisions. . . .'" *Nijhawan v. Attorney General*, 523 F.3d 387, 403 (3rd Cir. 2008) (Stapleton, J., dissenting).

The Supreme Court recently granted certiorari in *Nijhawan, Nijhawan v. Mukasey*, ___ S.Ct. ___, 2009 WL 104300, 77 USLW 3252 (U.S. Jan 16, 2009) (NO. 08-495), to resolve the deeply contested issue of which, if any, documents outside the record of conviction may be consulted in determining whether an alien was convicted of the $10,000 loss required by M(i). The Supreme Court's decision may ultimately impact cases such as Arguelles's, but it is not necessary or appropriate for me to predict or anticipate the Court's decision in that case. Accordingly, I dissent from the majority's decision here because of its departure from our circuit precedents, which are in turn based on the Supreme Court's decisions in *Taylor* and *Shepard*.

James's victims exceeded $10,000 for purposes of satisfying § 1101(a)(43)(M)(i)'s monetary threshold, but its conclusion was based on a mixture of factors, including some not present in this case, such as an indictment that charged a *scheme* of aiding and abetting, with three counts totaling $36,450, and a restitution order in an amount that exceeded $10,000. Nowhere does *James* hold that it is appropriate to deviate from the modified categorical approach to determine whether the amount of loss under § 1101(a)(43)(M)(i) exceeded $10,000, and it certainly does not state that statements contained in a PSR, without more, are sufficient under the modified categorical approach to reach such a determination as to the amount of loss. Furthermore, *James* does not even address any of the authorities or principles discussed in this dissent. It is well-established that "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (citing *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821)). Rather, careful discussions of the relevant Supreme Court cases and principles, plus the holdings in *Larin-Ulloa*, *Omari*, and our sentencing cases, are more persuasive to me because those sources deal directly with what I have discussed in this dissent.

In sum, as a result of the Government's failure (purposeful or otherwise) to place the Plea Agreement into the immigration record, we are left with an insufficient record of conviction by which to conclude that Arguelles was necessarily convicted of an

aggravated felony and is now subject to removal. I would thus grant Arguelles's petition for review and vacate the BIA's order of removal.

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For these reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60914

JOEL ARGUELLES-OLIVARES,
also known as, Joel Arguelles

Petitioner,

v.

MICHAEL B. MUKASEY,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals
File: A35 810 822 – El Paso

(Filed Apr. 22, 2008)

Before GARWOOD, DENNIS, and OWEN, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

The petitioner seeks review of a removal order, contending that his prior conviction for filing a false federal tax return did not constitute a removable offense. We deny the petition for review.

I

Joel Arguelles-Olivares pleaded guilty to violating 26 U.S.C. § 7206(1) by knowingly filing a false tax return.[1] The Department of Homeland Security thereafter instituted removal proceedings, charging that Arguelles-Olivares was removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(M). Subsection (M) defines an aggravated felony as "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000."[2] The Immigration Judge ordered Arguelles-Olivares removed, and the Board of Immigration Appeals affirmed the removal order.

Arguelles-Olivares contends that his tax offense is not an "aggravated felony" as defined by subsection (M)(i). He first asserts that subsection (M)(i) does not apply to any federal tax offenses because subsection (M)(ii) specifically identifies tax evasion, and only tax evasion, thereby reflecting congressional intent that

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[1] 26 U.S.C. § 7206(1) (2000) (providing that one who "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter" shall be guilty of a felony).

[2] 8 U.S.C. § 1101(a)(43)(M) (2000).

no other tax offense qualifies as an aggravated felony. He additionally argues that, even if (M)(i) includes knowingly filing a false federal tax return, there is no competent evidence that the amount of loss was $10,000 or more.

II

We are not the first court to consider whether a federal tax offense other than tax evasion may constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(M). A divided panel of the Third Circuit concluded in *Lee v. Ashcroft* that it may not.[3] The Ninth Circuit reached the opposite conclusion in *Kawashima v. Gonzales*,[4] expressly rejecting the majority's reasoning in *Lee*. The arguments supporting each opposing view have been cogently considered by the Third Circuit in the majority and dissenting opinions in *Lee* and by the Ninth Circuit in *Kawashima*. We agree with then-Judge (now Justice) Alito's[5] and the Ninth Circuit's construction of subsection (43)(M)(i).

The text of subsection (43)(M)(i) is straightforward and unambiguous. "The term 'aggravated felony' means . . . an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. . . ."[6] "Willfully" and knowingly signing

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[3] 368 F.3d 218, 220 (3d Cir. 2004).

[4] 503 F.3d 997, 1000-01 (9th Cir. 2007).

[5] *See Lee*, 368 F.3d at 225 (ALITO, J., dissenting).

[6] 8 U.S.C. § 1101(a)(43)(M)(i).

and filing a false federal tax return unquestionably "involves fraud or deceit," and courts have concluded that the federal government is a "victim" within the meaning of (43)(M)(i).[7] The difficulty in construing (43)(M)(i) is the immediately succeeding subsection: "or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000."[8] The Third Circuit concluded that this more specific reference to tax evasion and the juxtaposition of the two subsections rendered subsection 43(M)(i) less than "plain and unambiguous."[9] That court "turn[ed] to the traditional tools of statutory construction," concluding that subsection (M)(ii) would be "mere surplusage" if subsection (M)(i) included tax offenses because "the government has not identified, and we are unable to envision" "a case where a conviction for tax evasion would not involve fraud or deceit," and that "the principle that the specific governs the general also favors the interpretation that subsection (M)(ii) identifies the only removable tax offense, tax evasion,

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[7] *See Kawashima*, 503 F.3d at 1000; *Balogun v. U.S. Attorney General*, 425 F.3d 1356, 1361 (11th Cir. 2005); *see also United States v. Fleming*, 128 F.3d 285, 288 (6th Cir. 1997) ("In tax fraud cases, we consider the United States Treasury the victim.") (citing *United States v. Wright*, 12 F.3d 70, 74 (6th Cir. 1993)).

[8] 8 U.S.C. § 1101(a)(43)(M)(ii).

[9] *Lee*, 368 F.3d at 222-23 (concluding that (M)(i) "does not have a plain and unambiguous meaning, at least not as applied to a conviction under section 7206(1) of the Internal Revenue Code.").

while subsection (M)(i) does not apply to tax offenses."[10] The Third Circuit also reasoned that "for Congress to select tax evasion as the [only] 'aggravated' tax felony, justifying removal of an alien who committed it, while sparing lesser tax felons, is thoroughly consistent with the history and structure of criminal tax offenses."[11] In support of this conclusion, *Lee* cites the Supreme Court's decision in *Spies v. United States,*[12] characterizing tax evasion as the "'capstone' of tax law violations," the "'climax of this variety of sanctions'" and "'the *serious and inclusive* felony.'"[13] The Third Circuit decided that "Congress' intent is clear," and "[t]o the extent that any ambiguity lingers, we note that there is a 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'"[14]

We are persuaded, however, that Congress did not intend to single out tax evasion under 26 U.S.C. § 7201 for inclusion among aggravated felonies to the exclusion of all other tax felonies. We also conclude that subsection 43(M)(i) is unambiguous. Congress may well have seen subsection 43(M)(ii) as a necessary addition to subsection 43(M) since neither fraud nor deceit is a specific element of the crime of tax

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[10] *Id.* at 223-24.

[11] *Id.* at 224.

[12] 317 U.S. 492 (1943).

[13] *Lee,* 368 F.3d at 224 (quoting *Spies,* 317 U.S. at 497).

[14] *Id.* at 224-25 (citing *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987)).

evasion under 26 U.S.C. § 7201,[15] as both the dissent in *Lee* and the Ninth Circuit recognized.[16] Moreover, it is difficult to discern why Congress would want only a violation of 26 U.S.C. § 7201 involving $10,000 or more to constitute an aggravated felony, but not tax felonies involving fraud and deceit and the same amount of loss to the Government fisc. Although the maximum term of imprisonment for a violation of § 7201 is five years, while the maximum prison term for a violation of § 7206 is three years, both are serious crimes carrying the same maximum fines.

We respectfully part company with *Lee* in this regard, including its reliance on *Spies v. United States.*[17] The Third Circuit reasoned that in *Spies* the Supreme Court described the felony defined in former 26 U.S.C. § 145(b) as "the 'capstone' of tax law violations,"[18] and

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[15] *See* 26 U.S.C. § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . .").

[16] *Kawashima v. Gonzales,* 503 F.3d 997, 1001 (9th Cir. 2007) ("Congress might have wanted to ensure that no court would hold that tax evasion falls outside the definition of an aggravated felony simply because 'fraud' and 'deceit' are not specific elements of that offense."); *Lee v. Ashcroft,* 368 F.3d 218, 227 (ALITO, J., dissenting) ("[T]he drafters might have been concerned that some courts would hold that tax evasion falls outside the scope of subsection M(i) because neither 'fraud' nor 'deceit' is a formal element of the offense.").

[17] 317 U.S. 492 (1943).

[18] *Lee v. Ashcroft,* 368 F.3d 218, 224 (3d Cir. 2004) (quoting *Spies,* 317 U.S. at 497).

"[t]hus, for Congress to select tax evasion as the 'aggravated' tax felony, justifying removal of an alien who committed it, while sparing lesser tax felons, is thoroughly consistent with the history and structure of criminal tax offenses."[19] The *Spies* decision focused on "the acts necessary to make out the felony [under section 145(b) of the Revenue Act of 1936] and those which may make out the misdemeanor [under section 145(a)]."[20] The two provisions were similarly worded.[21] The Supreme Court's references to tax evasion as the "capstone" and the "climax of this variety of sanctions" must be considered in this context, as distinguishing the elements of the misdemeanor offense from those of the felony offense, not as comparing felony tax evasion with other felony tax offenses. Indeed, 26 U.S.C. § 7206 was not enacted until 1954, eleven years after *Spies* was decided in 1943.

The Supreme Court recently quoted the "capstone" statement that appears in *Spies* regarding 26 U.S.C. § 7201,[22] but also noted that "26 U.S.C. § 7206(1), criminalizing the willful filing of a tax

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[19] *Id.*

[20] *Spies*, 317 U.S. at 497.

[21] *See id.* at 493-94 nn.1-2.

[22] *Boulware v. United States*, 128 S.Ct. 1168, 1173 (2008) ("'[T]he capstone of [the] system of sanctions . . . calculated to induce . . . fulfillment of every duty under the income tax law . . .' is 26 U.S.C. § 7201, making it a felony willfully to 'attemp[t] in any manner to evade or defeat any tax imposed by' the Code.") (quoting *Spies*, 317 U.S. at 497).

return believed to be materially false" is "[a] related provision."[23] The Court further observed in *Boulware* that "it is arguable that 'the nature and character of the funds received can be critical in determining whether . . . § 7206(1) has been violated, [even if] proof of a tax deficiency [required under § 7201] is unnecessary.'"[24] The Court did not resolve the question, and of course, the Court was not construing 8 U.S.C. § 1101(a)(43)(M). But the Court's discussion does support our conclusion that the "capstone" argument advanced by the Third Circuit does not have the import that our sister court ascribes to it.

Other circuit courts have noted, correctly, that under some circumstances, a conviction for a violation of § 7206 may merge into a conviction under § 7201 as a lesser included offense.[25] But the corollary is that

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[23] *Id.* at 1172 n.1.

[24] *Id.* at 1178 n.9.

[25] *See, e.g., United States v. Dale*, 991 F.2d 819, 858 (D.C. Cir. 1993) ("[U]nder appropriate circumstances, lesser section 7206 offenses merge with the 'capstone' prohibition of section 7201."); *United States v. Helmsley*, 941 F.2d 71, 99 (2d Cir. 1991) ("[W]here false returns 'were incidental step[s] in the consummation of the completed offense of attempted defeat or evasion of tax and as such . . . constituted a crime within [a] crime under the lesser included offense doctrine' then a conviction under Section 7206(1) for filing those false returns merges into a conviction under Section 7201 for the inclusive fraud of tax evasion.") (quoting *United States v. White*, 417 F.2d 89, 93-94 (2d Cir. 1969) (quoting *Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950))); *White*, 417 F.2d at 94 ("[W]here proof of wilfully attempted evasion under 7201 also proves, *as an incident to the wilful evasion*, the preparing and subscribing of a fraudulent

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merger is not always appropriate. Section 7206 is a separate offense that is "separately punishable" from a violation of § 7201, unless there is also a violation of § 7201 and the § 7206 violation was incidental thereto.

There is no indication in the Tax Code that 26 U.S.C. § 7201, which addresses tax evasion, is the preferred means of prosecuting felony tax offenses. We cannot agree that Congress intended to exclude tax offenses involving fraud and deceit from 8 U.S.C. § 1101(a)(43)(M)(i) when it included a specific reference to 26 U.S.C. § 7201 in (43)(M)(ii).

Accordingly, a conviction under 26 U.S.C. § 7206(1) for filing a false tax return constitutes an aggravated felony for purposes of 8 U.S.C. § 1101(a)(43)(M) if that offense involved a loss of $10,000 or more.

III

Arguelles-Olivares contends there is no evidence that his tax offense involved $10,000 or more because the judgment of conviction does not mention the amount of actual loss. He asserts that it was error to rely on the Pre-Sentence Investigation Report (PSR), prepared in the tax offense proceedings, as evidence of the amount of loss in his immigration proceedings.

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return, the specific form of fraudulent conduct merges into the inclusive fraud charged under 7201. To cumulate penalties beyond the maximum authorized by 7201 is, therefore improper under these circumstances.").

Arguelles-Olivares asserts that the PSR must be excluded under the "categorical approach" of examining prior convictions and that the PSR's admission into evidence and reliance upon it was problematic for a number of other reasons. We first consider the pertinence of the "categorical approach."

A

The judgment in the tax offense prosecution does not reference any amount of loss, and the plea agreement in that criminal case was not made part of the record in the immigration proceedings. However, the PSR prepared in connection with Arguelles-Olivares' tax offense conviction states that Arguelles-Olivares' plea agreement determined the total amount of loss to be $248,335 for the years 1996-2000 and detailed the amounts of loss for each of those years.

This court had occasion to consider whether use of a PSR was proper in determining the amount of loss under 8 U.S.C. § 1101(a)(M)(i) in *James v. Gonzales*.[26] James had pled guilty to one count involving a transaction with a credit union in the amount of only $9,500.[27] We held that "[s]ince aiding and abetting bank fraud does not itself define a monetary threshold, we look beyond the statute to the record of conviction."[28] We cited the Third Circuit's decision in

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[26] 464 F.3d 505, 510-11 (5th Cir. 2006).

[27] *Id.* at 506-07.

[28] *Id.* at 510.

Singh v. Ashcroft[29] with approval for the proposition that we are not confined to the formal categorical approach of *Taylor v. United States*[30] when determining if an offense involved "'loss to the victim or victims [in excess of] $10,000.'"[31] As explained in this court's decision in *James* and the Third Circuit's decision in *Singh,* an amount of loss suffered by a victim is rarely an element of a criminal offense.[32] It seems highly unlikely that Congress intended for 8 U.S.C. § 1101(a)(43)(M)(i) to apply only to convictions under statutes that included a monetary loss to a victim in excess of $10,000 as an element of the offense. For

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[29] 383 F.3d 144, 159-61 (3d Cir. 2004).

[30] 495 U.S. 575 (1990).

[31] *James,* 464 F.3d at 510 n.26 ("'We turn now to the cases in which we did not confine ourselves to the formal categorical approach of *Taylor*. All three such cases . . . concerned 8 U.S.C. § 1101(a)(43)(M)(i). . . . In all three cases, the relevant criminal statute did not include a 'loss greater than $10,000' element. Yet in these cases we expressly rested our holding on the underlying facts about the amount of loss involved. . . . In the case of the enumerating statute, a departure from the formal categorical approach seems warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. The qualifier 'in which the loss to the victim or victims exceeds $10,000' is the prototypical example-it expresses such a specificity of fact that it almost begs an adjudicator to examine the facts at issue.'" (quoting *Singh,* 383 F.3d at 159-61)).

[32] *See* n.9, *supra*; *see also Dulal-Whiteway v. U.S. Dep't of Homeland Sec.,* 501 F.3d 116, 128 (2d Cir. 2007) ("Statutes of conviction rarely correlate precisely with statutes of removability – for example, few statutes criminalizing fraud enumerate distinct violations corresponding to the $10,000 loss amount required by the removability statute [8 U.S.C. § 1227(a)(2)(C)].").

example, Congress itself has not included monetary loss to victims in defining a number of crimes involving fraud or deceit, such as bank fraud.[33] A conviction may be obtained for bank fraud under 18 U.S.C. § 1344 by proving the statutory elements. The amount of loss to the victim is a matter that is considered for sentencing purposes. As a matter of statutory construction, its seems that Congress intended for the inquiry under 8 U.S.C. § 1227(a)(2)(A)(iii)[34] and § 1101(a)(43)(M) to be whether, as a categorical matter, the alien was convicted of "an offense . . . that involves fraud or deceit" as an element of the offense

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[33] *See* 18 U.S.C. § 1344, which provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
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> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

See also id. § 152 (concealment of assets, false oaths and claims in bankruptcy); § 286 (conspiracy to defraud the Government with respect to claims); § 472 (uttering counterfeit obligations or securities); § 1010 (fraud and false statements in HUD and FHA transactions); and § 1341 (mail fraud).

[34] 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that: "Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

or that the offense necessarily entails fraud or deceit.[35] The requirement that the offense was one "in which the loss to the victim or victims exceeds $10,000"[36] is a factual matter to be determined from the record of conviction, but the amount of loss is not required to be an element of the conviction itself.

We do not quarrel with the dissent's observation that we have applied the categorical or modified categorical approach in the immigration context.[37] We have done so, however, when determining the nature or elements of the offense of conviction[38] but not the amount of loss.[39] The categorical and modified categorical approaches are "standards for establishing the

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[35] 8 U.S.C. § 1101(a)(43)(M)(i) (defining an aggravated felony to include "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.").

[36] *Id.*

[37] *See, e.g., James,* 464 F.3d at 508 & n.16 ("In determining whether an offense qualifies as an aggravated felony under the INA, we employ a categorical approach and look 'at the statute under which the alien was convicted rather than at the particular underlying facts,'" and recognizing "[a]n exception to the categorical approach exists 'when a statute is divisible into discrete subsections, violations of one or more of which would meet the criterion at issue.'") (quoting *Omari v. Gonzales,* 419 F.3d 303, 307, 308 (5th Cir. 2005)).

[38] *See, e.g., id.* at 508 (employing the categorical approach to determine "whether the offense of aiding and abetting bank fraud necessarily entails, or has as at least one element, fraud or deceit").

[39] *See id.* at 510 ("Since aiding and abetting bank fraud does not itself define a monetary threshold, we look beyond the statute to the record of conviction.").

fact of prior convictions, turning on the basis of trial or plea."[40] They are the Supreme Court's "pragmatic conclusion about the best way to identify generic convictions . . . , while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction."[41] The modified categorical approach accordingly restricts the documents that may be consulted to determine whether a conviction was for a generic offense, and the focus is, properly, on the conviction.

When the amount of loss to a victim is not an element of an offense, the focus should not be limited to the conviction itself. The amount of loss is relevant in a criminal prosecution primarily, if not exclusively, to sentencing. When a tribunal subsequently examines, for collateral purposes like those here, the amount of loss resulting from an offense, the reason for applying the modified categorical approach does not fully obtain.[42] Our inquiry should be guided by the statute that initiates that inquiry. The Immigration

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[40] *Shepard v. United States*, 544 U.S. 13, 19 (2005).

[41] *Id.* at 20.

[42] *See generally Conteh v. Gonzales*, 461 F.3d 45, 61 (1st Cir. 2006) (rejecting an argument that an amount of loss in a restitution order could not be considered in removal proceedings "because that amount was neither separately charged in the indictment nor found by the jury beyond a reasonable doubt," reasoning "[t]he premise of this argument – that the categorical approach should be transplanted root and branch from the criminal context into the civil removal context – is incorrect.").

and Nationality Act provides that the government "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."[43] The Act further specifies, "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."[44] We

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[43] 8 U.S.C. § 1229a(c)(3)(A).

[44] *Id.* The INA also addresses proof of a conviction in § 1229a(c)(3)(B):

> In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
>
> **(i)** An official record of judgment and conviction.
>
> **(ii)** An official record of plea, verdict, and sentence.
>
> **(iii)** A docket entry from court records that indicates the existence of the conviction.
>
> **(iv)** Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
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> **(v)** An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
>
> **(vi)** Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

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should determine, therefore, whether there was clear and convincing evidence that Arguelles-Olivares's prior conviction involved an amount of loss greater than $10,000 and whether the evidence establishing that the conviction involved such a loss was reasonable, substantial, and probative. These are the standards that apply in determining whether the BIA erred in relying on the PSR to determine the amount of loss.

We recognize that there is disagreement among the circuit courts as to how the amount of loss involved in a prior criminal conviction may be ascertained in civil removal proceedings. The Ninth Circuit has held that the amount of loss must be admitted by a defendant or found by the trier of fact in the prior criminal prosecution.[45] Similarly, the Second Circuit "permit[s] the BIA to remove only those aliens who have actually or necessarily pleaded [in the underlying criminal proceedings] to the elements of a removable offense," including the greater-than-$10,000-loss

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(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

[45] *See Li v. Ashcroft*, 389 F.3d 892, 897 (9th Cir. 2004) (holding that "if the record of conviction demonstrates that the jury in Petitioner's case actually found that Petitioner caused, or intended to cause, a loss to the government of more than $10,000, the modified categorical approach will be satisfied," but not otherwise).

requirement.[46] Our court has construed the statute differently, and we believe correctly, in *James*.[47]

Based on the facts of this case, there is clear and convincing evidence that the PSR accurately reflected the amount of loss. An addendum to the PSR reflects that Arguelles-Olivares had no objections to the PSR. The PSR additionally states that a probation officer interviewed Arguelles-Olivares regarding the report and that Arguelles-Olivares agreed with the chart in the report showing the tax losses by year, including a loss of $75,982 for 1999. The district court adopted the PSR's factual findings. Arguelles-Olivares does not dispute that he agreed to the facts set forth in the PSR including, specifically, the fact that the amounts of loss for each year were part of the plea agreement and that they totaled in excess of $10,000 for each year. Arguelles-Olivares's failure to object to these facts in the PSR, his admission that they were correct, and the district court's adoption of these facts is clear and convincing evidence that the loss to the government was in excess of $10,000.

The dissent cites several decisions in support of its conclusion that the BIA cannot consider a PSR in determining the amount of loss. The first decision on which the dissent relies is *Larin-Ulloa v. Gonzales*

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[46] *Dulal-Whiteway v. U.S. Dep't of Homeland Sec.*, 501 F.3d 116, 133 (2d Cir. 2007).

[47] *James v. Gonzales*, 464 F.3d 505 (5th Cir. 2006).

from this court.[48] But that case had nothing to do with an amount of loss. The issue was whether a prior Kansas conviction was a crime of violence within the meaning of 18 U.S.C. § 16(b), specifically, whether "intentionally causing physical contact with another person with a deadly weapon in a rude, insulting or angry manner clearly involves a substantial risk that physical force against another person may be used."[49]

The dissent cites the Second Circuit's decision in *Dulal-Whiteway v. U.S. Department of Homeland Security,* but as discussed above, that circuit has chosen to treat the amount of loss essentially as an element of the underlying conviction. This circuit has not.

The Eleventh Circuit held in *Obasohan v. U.S. Attorney General,*[50] also cited by the dissent, that an amount of loss must be charged and proven or admitted by the defendant in the underlying criminal proceedings. Although the breadth of that decision is not entirely clear, that court would apparently permit the BIA to rely on a restitution order if a defendant admitted the amount of loss.[51] The First Circuit held in *Conteh v. Gonzales,* cited by the dissent, that the BIA could rely on a restitution order to determine the

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[48] 462 F.3d 456 (5th Cir. 2006).

[49] *Id.* at 465.

[50] 479 F.3d 785, 791 (11th Cir. 2007).

[51] *Id.* at 790 ("There was no basis in this record from which the IJ could have found by 'clear, unequivocal and convincing' evidence that the restitution order was based on convicted or admitted conduct.").

amount of loss when "the district court made an explicit finding of the amount of loss as part of its final judgment,"[52] even though that finding may have been based in part on facts in the PSR.[53]

In the final analysis, our circuit's precedent is clear, and with respect, we disagree with the dissent. The PSR could be considered under the circumstances presented here, particularly given that Arguelles-Olivares admitted in the underlying criminal proceedings that the amounts of loss reflected in the PSR were correct.

B

Arguelles-Olivares contends that there must be proof that the amount of loss exceeded $10,000 in a single tax year. Even assuming *arguendo* that this is a correct proposition of law, the threshold was met.

He asserts that the PSR was inadmissible because removal proceedings are prosecutorial in nature and that use of a PSR is incompatable with the purpose of the report as a sentencing and correctional tool. He additionally asserts that the PSR is confidential and cannot be accessed without leave of court.

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[52] 461 F.3d 45, 62 (1st Cir. 2006).

[53] *Id.* at n.10 ("It is of no consequence that this finding may, in part, have reflected information contained in the PSI Report. After all, findings incorporated in the final judgment routinely are predicated on evidence outside the formal record of conviction.").

Arguelles-Olivares made no attempt during the immigration proceedings to seek an injunction or order from the district court to maintain the confidentiality of the PSR. He did not identify any provisions of the PSR that would jeopardize his own privacy or the government's interest in maintaining the trust of third-party witnesses by keeping the PSR confidential. There was no abuse of discretion in admitting the PSR.

The record contains evidence that supports the BIA's conclusion that Arguelles-Olivares is an aggravated felon, and we will not vacate that determination.

* * *

We DENY the petition for review.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent and would grant the alien's petition for review. In my opinion, the majority incorrectly decides two important *res nova* immigration law issues. First, the majority joins the less meritorious side of a circuit split, giving no weight whatever to the INA's designation of tax evasion as the sole tax offense explicitly named as an "aggravated felony"; the majority does not even attempt to explain away the sharp clash between its alien-hostile statutory construction and the traditional principle of construing uncertain statutes in favor of aliens. Second, and more grievous, the majority refuses to follow our

circuit precedents that have consistently applied the Supreme Court's *Taylor-Shepard* "modified categorical approach" in removal cases; instead, it approves the BIA's looking outside the record of the alien's conviction to find an aggravated felony based upon a paper trial of underlying facts contained in his PSR. In so doing, the majority creates a circuit split from the four circuits unanimously holding such use of PSRs is improper under the *Taylor-Shepard* modified categorical approach; and it disregards the numerous decisions of our own prior panels consistently applying the *Taylor-Shepard* methodology in sentencing cases. The majority's second decision is particularly unfortunate because it exposes aliens in this Circuit to the potential of unfair practices, inequality of justice, and deportations based on constructive paper trials without juries rather than on records of judicial convictions.

1.

A.

Joel Arguelles-Olivares was born March 13, 1957, in Mexico. He immigrated to the United States more than thirty years ago and has been a Permanent Resident Alien since April 6, 1977.[1] Since then, he has lived in Houston, Texas; Sugarland, Texas; New York

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[1] Arguelles has two sisters and two brothers, all of whom are naturalized citizens living in Texas. His mother, a United States citizen, lives in Mission, Texas.

City; Round Rock, Texas; Austin, Texas; Hutto, Texas; and Pflugerville, Texas, where he currently resides. After moving to the United States, Arguelles lived with Laverne Clancy for thirteen years. Together they have one daughter, who is currently a student at Baylor University in Waco, Texas. In 1993, Arguelles married Pearl Lavenia Whidden Pfeffer. Together they have two children, ages five and two, who live with them in their three-bedroom, one-story house. Mrs. Arguelles has two children from a previous marriage, one of whom lives with them.

Since 1978, Arguelles has been a self-employed masonry contractor. The record indicates that Arguelles has been financially successful in that capacity and that he regularly employs a number of individuals. Although the details of the size of his work force and his employees' wages or salaries are not disclosed in the record, the PSR states that in the 2001 tax year he reported a taxable income of $459,390 upon which he paid the correct amount of $175,012 in income taxes.

B.

On April 7, 2003, Arguelles was charged by criminal information in the United States District Court for the Western District of Texas with one count of filing a false income tax return for the 1999 tax year in violation of 26 U.S.C. § 7206(1). On May 1, 2003, Arguelles pleaded guilty in accordance with a written Plea Agreement to the charge against him. He was

then sentenced on July 8, 2003, to a term of twenty-one months of imprisonment, to be followed by a supervised release term of one year, but he was not fined or ordered to pay any restitution.

On account of this conviction, the Department of Homeland Security ("DHS") initiated removal proceedings against Arguelles pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony as defined by 8 U.S.C. § 1101(a)(43)(M). During the proceedings, Arguelles admitted to all of the allegations contained in the DHS's Notice to Appear except that he specifically denied that his conviction resulted in a loss to the victim, in this case the Government, of more than $10,000. The DHS did not introduce the written Plea Agreement into the record of this removal proceeding in order to prove that the amount of loss exceeded $10,000.[2] The DHS did file the charging document, a criminal information, and the judgment of conviction into the record, but neither of these instruments discloses how much Arguelles underpaid his 1999 federal income taxes.

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[2] The DHS does not explain why it failed to introduce this crucial document into evidence. If the written Plea Agreement discloses clearly that Arguelles underpaid his 1999 taxes by more than $10,000, the DHS's failure to file it has caused this court to expend time and effort unnecessarily on the appeal, the oral argument and the opinion writing on this issue. If the Plea Agreement does not contain clear evidence to this effect, then a serious question is raised as to whether the DHS has dealt fairly with Arguelles and honorably with this court.

The criminal information simply states that he underpaid his taxes by a substantial amount. The judgment of conviction merely adjudges him guilty of violating 26 U.S.C. 7205(1)[3] by Making a Subscribing a (sic) False Return on April 4, 2000. The only document in the record that provides any indication of how much Arguelles underpaid his 1999 federal income taxes is the PSR.[4] Arguelles objected to the inclusion of the PSR into the record of his immigration proceedings, but the IJ admitted it and both the IJ and the BIA relied on statements in the PSR to conclude that Arguelles's conviction had resulted in a loss amount that exceeded $10,000. Both the IJ and the BIA also rejected Arguelles's argument that a conviction for filing a false tax return under 26 U.S.C. § 7206(1) cannot qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i).

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[3] This is apparently a typographical error. Section 7206(1) was evidently intended.

[4] The PSR contains the following statements concerning the alleged loss amount: "On May 1, 2003, the defendant pled guilty in accordance with a written Plea Agreement, wherein the Government and the defendant agree that the tax loss for sentencing purposes will include the loss from tax years 1996 through 2000 for a total tax loss of $248,335."; "The IRS determined that the defendant owes $248,335 in unpaid taxes."; and "Restitution in the amount of $248,335 is outstanding. . . ." The PSR also contains a table purporting to show the additional amount of tax that Arguelles-Olivares owed for tax years 1996-2000, which totaled $248,335, including $75,982 for tax year 1999.

Accordingly, the IJ deemed Arguelles removable for being convicted of an aggravated felony and ordered Arguelles removed to Mexico. The BIA affirmed the removal order. As a consequence of being removed for conviction of an aggravated felony, Arguelles will be permanently barred from re-entry to the United States. *See* 8 U.S.C. § 1182(a)(9)(A)(i)-(ii).

2.

In his petition for review, Arguelles re-urges his argument that no conviction under 8 U.S.C. § 7206(1) for filing a false tax return can qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(M). As the majority points out, this issue has split the only two Circuit courts that have addressed it thus far. *Compare Kawashima v. Gonzales,* 503 F.3d 997 (9th Cir. 2007) (holding that a violation of § 7206(1) in which the tax loss to the government exceeds $10,000 constitutes an aggravated felony under § 1101(a)(43)(M)(i)), *with Ki Se Lee v. Ashcroft,* 368 F.3d 218 (3d Cir. 2004) (reaching the opposite conclusion), *but see id.* at 225 (Alito, J., dissenting). Although, in my view, we need not step into this crossfire to properly resolve the matter before us, I nevertheless note my belief that the Third Circuit majority's reasoning appears to be well-grounded in familiar statutory interpretation principles. As explained in great detail by the Third Circuit majority in *Ki Se Lee,* the juxtaposition of subsections (M)(i) and (M)(ii) – one a general provision encompassing offenses involving "fraud or deceit," and one a specific provision focused solely on

federal tax evasion, both enacted simultaneously in 1996 – suggests, at the very least, an ambiguity as to whether other tax offenses, such as violations of § 7206(1), are covered under the more general (M)(i). *See id.* at 222-25. The Supreme Court and this Circuit have consistently recognized "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987); *see also INS v. St. Cyr,* 533 U.S. 289, 320 (2001) (same); *INS v. Errico,* 385 U.S. 214, 225 (1966) ("'[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.'") (quoting *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948)); *Martinez v. Mukasey,* 519 F.3d 532, 544 (5th Cir. Mar. 11, 2008) (quoting *Cardoza-Fonseca* and explaining that "[t]his canon of construction, comparable to the rule of lenity in criminal cases, is based on the drastic nature of removal"); *Banda-Ortiz v. Gonzales,* 445 F.3d 387, 396 (5th Cir. 2006) (Smith, J., dissenting) ("Though the majority finds this weight of authority insufficient, it might at least, out of comity, acknowledge the merit of the competing position by applying the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'"). While the majority here may not agree with the Third Circuit's view of (M)(i), in light of the weighty discussion of statutory history, construction, and interpretation presented in both *Ki Se Lee* and

Kawashima, I believe, at minimum, this issue requires more encompassing analysis than that offered in the majority opinion before this Circuit aligns itself with either the Third or Ninth Circuit's position and creates a Circuit – majority (for now) on this aggravated felony issue, which has such serious consequences for aliens and their families.[5]

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[5] Along this line, I find puzzling the majority's attempt, unsupported by any authority whatever, to cabin the language used by Justice Jackson in *Spies v. United States*, 317 U.S. 492, 497 (1943), and discussed by the majority in *Ki Se Lee*, 368 F.3d at 224, as relevant only in the context of violations of the Revenue Act of 1936. *Spies* has not been interpreted so narrowly. *See Boulware v. United States*, 128 S. Ct. 1168, 1173 (2008) ("'[T]he capstone of [the] system of sanctions . . . calculated to induce . . . fulfillment of every duty under the income tax law,' *Spies v. United States*, 317 U.S. 492, 497, 63 S.Ct. 364, 87 L.Ed. 418 (1943), is 26 U.S.C. § 7201, making it a felony willfully to 'attemp[t] in any manner to evade or defeat any tax imposed by' the Code."); *United States v. Dale*, 991 F.2d 819, 858 (D.C. Cir. 1993) (stating that "[t]he Internal Revenue Service sets out a comprehensive scheme prohibiting and punishing tax fraud; section 7201, the 'evasion' provision has been called the 'capstone' of this scheme" and holding that convictions under section 7206 may "merge, as lesser included offenses, into the 'capstone' section 7201 tax evasion convictions"); *United States v. Helmsley*, 941 F.2d 71, 99 (2d Cir. 1991) (calling section 7201 the "'capstone' of the comprehensive statutory scheme prohibiting and punishing federal tax fraud" and holding that a conviction under 7206(1) for filing false returns may merge into a conviction under section 7201 "for the inclusive fraud of tax evasion"). Also, the conceptual difference between evasion and false filing is significant. The former requires knowing intentional cause of a loss to the Government, whereas the latter requires only knowing intent to file a false return. *See, e.g., United States v. Taylor*, 574 F.2d 232, 234 (5th Cir. 1978) ("Unlike section [ ] 7201 . . . , section

(Continued on following page)

3.

Title 8, Section 1227(a)(2)(A)(iii) of the United States Code renders removable "[a]ny alien who is convicted of an aggravated felony at any time after admission." Title 8, Section 1101(a)(43)(M)(i) of the United States Code defines "aggravated felony" as, *inter alia,* an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." Arguelles was convicted of deceit or fraud in connection with filing a false tax return in violation of 26 U.S.C. § 7206(1), which provides:

> Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Assuming *arguendo* the applicability of 8 U.S.C. § 1101(a)(43)(M)(i) to violations of 26 U.S.C. § 7206(1), Arguelles does not contest that his conviction under this statute "involves fraud or deceit" within the meaning of the removability provision. He contends,

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7206(1) requires the prosecution to prove neither intent to evade payment of taxes nor the existence of any taxable income.").

however, that his record of conviction fails to establish that the loss to the victim of his crime exceeded $10,000. In particular, he argues that it was error for the IJ to consult the PSR, which indicated that the loss to his victim, the Government, was $75,982, because it should not have been considered part of his record of conviction. I agree that relying upon these materials to prove that Arguelles was convicted of a fraud involving a loss greater than $10,000 violated the modified categorical approach to determining aliens' removability based on criminal convictions.

My conclusion necessarily follows from our Circuit's precedent in this area. We have stated that "[t]o determine whether an alien's guilty plea conviction constitutes an aggravated felony for removal purposes, we apply a 'categorical approach,' under which we refer only to the statutory definition of the crime for which the alien was convicted (rather than attempt to reconstruct the concrete facts of the actual criminal offense) and ask whether that legislatively-defined offense necessarily fits within the INA definition of an aggravated felony." *Larin-Ulloa v. Gonzales,* 462 F.3d 456, 463 (5th Cir. 2006); *see also Fortes v. Mukasey,* No. 06-61002, 2007 WL 4259302, at *3 (5th Cir. 2007) (unpublished); *Omari v. Gonzales,* 419 F.3d 303, 307 (5th Cir. 2005) (citing *Lopez-Elias v. Reno,* 209 F.3d 788, 791 (5th Cir. 2000)); *Nguyen v. Ashcroft,* 366 F.3d 386, 388 (5th Cir.2004). We do not consider the underlying facts that resulted in the alien's conviction. *Fortes,* 2007 WL 4259302, at *3 (citing *Larin-Ulloa,* 462 F.3d at 463).

We adopted this methodology in the immigration context because of its analogous roots in *Taylor v. United States,* 495 U.S. 575 (1990), and *Shepard v. United States,* 544 U.S. 13 (2005), two sentencing cases in which the Supreme Court described the basic structure and underlying rationales of the modified categorical approach. *See Larin-Ulloa,* 462 F.3d at 463-64; *Dulal-Whiteway v. Dep't of Homeland Sec.,* 501 F.3d 116, 124 (2d Cir. 2007). Among the considerations that led the *Taylor* court to conclude that a categorical approach to prior convictions was necessary were concerns about the practical difficulties and fairness problems that would arise if courts were permitted to consider the facts behind prior convictions.[6] The *Taylor* court noted that a fact-based approach to prior convictions would potentially require federal courts to relitigate a defendant's prior conviction in any case where the government alleged that the defendant's actual conduct fit the definition of a predicate offense. *Taylor,* 495 U.S. at 601; *see also Tokatly v. Ashcroft,* 371 F.3d 613, 621 (9th Cir. 2004) (noting "fundamental principle" that "in determining whether a prior conviction constitutes a predicate

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[6] The *Taylor* court also emphasized that the language of 18 U.S.C. § 924(e) supported a categorical approach because its sentence enhancement provisions are triggered by prior convictions, and not by the fact that the person has previously committed an offense. *See Taylor,* 495 U.S. at 601. This rationale applies equally to the INA's provision concerning aggravated felonies. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *Larin-Ulloa,* 462 F.3d at 464 n.8.

offense, we must avoid 'the enormous problems of relitigating past convictions, especially in cases where the defendant pleads guilty and there is no record of the underlying facts'") (quoting *United States v. Castillo-Rivera,* 244 F.3d 1020, 1022 (9th Cir. 2001)). The *Taylor* court also recognized the unfairness that could result if a factual approach was applied to prior guilty plea convictions:

> [I]n cases where the defendant pleaded guilty, there is often no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

Taylor, 495 U.S. at 601-02.

However, as we explained in *Larin-Ulloa,* the categorical approach is not absolute. 462 F.3d at 464. "If the statute of conviction defines multiple offenses, at least one of which does not describe an aggravated felony, we apply a modified categorical approach, under which we may also examine certain additional documents (if contained in the record framing the guilty plea conviction) to determine whether the conviction was 'necessarily' for a particular crime defined by the statute that meets the aggravated felony criterion." *Id.* (citing *Shepard v. United States,* 544 U.S. at 13, 20-21, 26; *Omari,* 419 F.3d at 308); *see also Dickson v. Ashcroft,* 346 F.3d 44, 48-49 (2d Cir. 2003) ("In reviewing a conviction under a divisible statute,

the categorical approach permits reference to the record of conviction for the limited purpose of determining whether the alien's conviction was under the branch of the statute that permits removal."). In the case of guilty plea convictions under such a divisible statute, we may consider, in addition to the language of the statute, the "'charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.'" *Omari,* 419 F.3d at 308 (quoting *Shepard,* 544 U.S. at 16). The use of these documents is permitted because they are considered sufficiently conclusive and reliable to establish the facts to which the alien actually pleaded guilty. *See Shepard,* 544 U.S. at 23 (stating that evidence of facts should be "confined to records of the convicting court approaching the certainty of the record of conviction"). "Documents not of that kind, including police reports and complaint applications, may not be considered." *Omari,* 419 F.3d at 308.

If the documents that we may consider under the modified categorical approach are insufficient to establish that the petitioner was necessarily convicted of an aggravated felony, we must find that "the government has not met its burden of proving that the conduct for which the petitioner was convicted constitutes a predicate offense, and the conviction may not be used as a basis for removal." *Tokatly,* 371 F.3d at 620; *see Omari,* 419 F.3d at 309 (same).

The analogous statutory structures in the sentencing and deportation contexts, as well as the

reasoning of *Taylor* and *Shepard*, justify the use of the categorical approach to determine removability *vel non*. *See Dulal-Whiteway*, 501 F.3d at 125 (citing *Ming Lam Sui v. INS*, 250 F.3d 105, 116-17 (2d Cir. 2001)). "[L]ike the burglary sentencing enhancement, the Immigration and Nationality Act ("INA"), 8 U.S.C § 1227(a)(2)(A)(iii), rendered removable 'an alien who has been "convicted" of an aggravated felony, not one who has "committed" an aggravated felony.'" *Id.* (citing *Sui*, 250 F.3d at 117). Moreover, "nothing in the legislative history suggested a factfinding role for the BIA in ascertaining whether an alien had committed an aggravated felony, just as, in *Taylor*, nothing suggested such a role for the sentencing court in evaluating the factual basis of a prior burglary conviction." *Id.* at 126. Further, the practical evidentiary difficulties and potential unfairness associated with looking behind the offense of conviction are "no less daunting" in the immigration than in the sentencing context. *Id.* Finally, given the exception in *Taylor*, when a statute of conviction criminalizes both conduct that would constitute a removable offense and conduct that would not, IJs might appropriately consult an indictment or jury instructions to determine the basis of an alien's conviction, but IJs cannot look behind the record of conviction to reach their own determination as to whether the underlying facts constitute a conviction for an aggravated felony. *See id.*; *Sui*, 250 F.3d at 117-18 (quoting *Lewis v. INS*, 194 F.3d 539, 543 (4th Cir. 1999)).

Accordingly, like the Second Circuit and others, this Court has applied the modified categorical approach as a two-step inquiry: first, we determine if the statute is "divisible," such that some categories of proscribed conduct render an alien removable and some do not; second, we consult the record of conviction to ascertain the category of conduct of which the alien was convicted. *Larin-Ulloa,* 462 F.3d at 467-68; *Omari,* 419 F.3d at 308.

In the present case, 26 U.S.C. § 7206(1), the statute criminalizing fraud or deceit in connection with filing a false tax return, is a divisible statute. The provision encompasses deceit or fraud by which the perpetrator files a tax return that he does not believe to be true and correct; however, under 8 U.S.C. § 1101(a)(43)(M)(i), such fraud is only a removable offense when the loss to the victim exceeds $10,000. Thus, the statute proscribes some conduct that is not removable – fraud causing a loss between $0 and $10,000 – and some conduct that is removable – deceit or fraud causing a loss greater than $10,000 – requiring that we consult the record of conviction to determine which of the two types of conduct actually underlay Arguelles's conviction.

Under the *Taylor-Shepard* modified categorical approach, which our removal circuit precedents have heretofore followed, we have concluded that the BIA's consultation of the PSR as proof of the specific facts underlying the petitioner's prior conviction was improper. *See Larin-Ulloa,* 462 F.3d at 468; *cf. Omari,* 419 F.3d at 308 (PSR not considered part of the

record of conviction). In *Larin-Ulloa,* we held that a "sentencing factor notation is not the type of documentary evidence to which this court or the BIA may refer, under the modified categorical approach as prescribed by Shepard, to determine the nature of an alien's guilty plea conviction." 462 F.3d at 468. We further concluded that "[u]nlike the charging document, the guilty plea, or the factual basis for the plea confirmed by the defendant, sentencing reasons and factors do not simply define the charge and the defendant's guilty plea, but, instead, frequently refer to facts neither alleged nor admitted in court." *Id.* at 468-69. Other than for its possible use to prove the existence of a conviction, *see* 8 U.S.C. § 1229a(c)(3)(B)(vi),[7] such a

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[7] Section 1229a(c)(3)(B) provides:

(B) Proof of convictions. In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated,

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report simply is not a part of the formal record of conviction. *Id.* at 468. This conclusion is further supported by our sentencing cases, in which we have consistently said that a district court may not rely on the PSR's characterization of the offense for enhancement purposes. *See United States v. Bonilla-Mungia,* 422 F.3d 316, 320-21 (5th Cir.), *cert. denied,* 546 U.S. 1070 (2005) (holding that *Shepard* does not permit court to consider factual narrative in probation officer's PSR); *United States v. Garza-Lopez,* 410 F.3d 268, 273-74 (5th Cir.), *cert. denied,* 546 U.S. 919 (2005) (same); *cf. Shepard,* 544 U.S. at 20-23 (precluding the use of a police report to prove the underlying facts of the putative predicate offense). Moreover, that Arguelles may not have objected to the PSR's factual findings[8]

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the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

[8] The majority's characterization of Arguelles as having agreed to certain facts relating to the loss amount for the 1999 tax year is supported only by self-serving references to the probation officer's statements in the PSR and its addendum. The majority does not-because it cannot-point to any statement in the record of conviction by which Arguelles admitted to or failed to object to the factual statements contained in the PSR, as the

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and the district court adopted them for sentencing purposes are irrelevant to determining whether Arguelles's conviction was for removable, as opposed to non-removable, conduct because the PSR "typically describes conduct that demonstrates the commission of an offense even if the alien was never *convicted* for that activity" and may contain inaccurate, unproven, and inadmissible facts.[9] *Dickson,* 346 F.3d at 54 (emphasis in original).

Accordingly, the government's argument that a PSR is properly considered among the record of conviction materials, such that the IJ could rely upon the loss amount it described, is foreclosed by *Larin-Ulloa. Cf. Omari,* 419 F.3d at 308 (PSR not considered part of the record of conviction). The IJ therefore improperly relied on statements set forth in Arguelles's PSR to establish the loss amount for the 1999 tax year. *Accord Dulal-Whiteway,* 501 F.3d at 129 ("The government's argument that a PSR is properly considered among [the modified categorical approach's permissible] materials, such that the IJ could rely upon the loss amount it described, is foreclosed by *Dickson* [*v. Ashcroft,* 346 F.3d 44, 52-55

Government did not include a transcript of the plea colloquy or the sentencing hearing in the immigration record, in addition to not including the Factual Basis and Plea Agreement.

[9] Here, the PSR's "proof" of Arguelles's 1999 tax year liability amounts to nothing more than an unsourced and unverified chart that is not accompanied by IRS documents or raw data that provide any indication as to how these numbers were calculated or even who specifically performed the calculations.

(2d Cir. 2003)], where we rejected a virtually identical claim."); *Obasohan v. Attorney Gen.*, 479 F.3d 785, 789-91 (11th Cir. 2007) (holding that an IJ was not entitled to rely on loss amounts that were alleged only in a PSR); *Conteh v. Gonzales*, 461 F.3d 45, 58 (1st Cir. 2006) ("We reject the government's argument: the BIA's consultation of the PSI Report as proof of the specific facts underlying the petitioner's prior conviction was improper. Other than for its possible use to prove the *existence* of a conviction, such a report simply is not a part of the formal record of conviction.") (emphasis in original) (citations omitted); *Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir. 2003) (holding that a PSR is "insufficient evidence" to show that an alien's conviction constitutes an aggravated felony) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc)).

Finally, the majority's holding was not, as the majority states, compelled by *James v. Gonzales*, 464 F.3d 505 (5th Cir. 2006). *James*, in my opinion, does not represent a clear holding on anything in particular, but should be restricted as precedent to its facts and reconsidered en banc. There, the panel affirmed the BIA's determination that the loss to James's victims exceeded $10,000 for purposes of satisfying § 1101(a)(43)(M)(i)'s monetary threshold, but its conclusion was based on a mixture of factors, including some not present in this case, such as an indictment that charged a *scheme* of aiding and abetting, with three counts totaling $36,450, and a

restitution order in an amount that exceeded $10,000. Nowhere does *James* hold that it is appropriate to deviate from the modified categorical approach to determine whether the amount of loss under § 1101(a)(43)(M)(i) exceeded $10,000, and it certainly does not state that statements contained in a PSR, without more, are sufficient under the modified categorical approach to reach such a determination as to the amount of loss. Furthermore, *James* does not even address any of the authorities or principles discussed in this dissent. It is well-established that "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) (citing *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821)). Rather, intelligent discussions of the relevant Supreme Court cases and principles, plus the holdings in *Larin-Ulloa*, *Omari*, and our sentencing cases, are more persuasive to me because those sources deal directly with what I have discussed in this dissent.

In sum, as a result of the Government's failure (purposeful or otherwise) to place the Plea Agreement into the immigration record, we are left with an insufficient record of conviction by which to conclude that Arguelles was necessarily convicted of an aggravated felony and is now subject to removal. I would thus grant Arguelles's petition for review and vacate the BIA's order of removal. However, because the use of PSRs in the 8 U.S.C. § 1101(a)(43)(M)(i) context was heretofore a *res nova* issue in our Circuit, I would also remand for the purpose of allowing the IJ to

determine whether documents that are properly considered part of the record of conviction, including those with which the Government may now wish to supplement the record, establish that Arguelles was convicted of a removable offense.

4.

For these reasons, I respectfully dissent.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A35 810 822 – El Paso Date: OCT 6 2005

In re:
JOEL ARGUELLES-OLIVARES a.k.a. Joel Arguelles

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF
OF RESPONDENT: Robert A. Shivers, Esquire

ON BEHALF OF DHS: William M. Hunt
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Termination

The respondent appeals from a September 15, 2004, decision by an Immigration Judge finding him removable from the United States as an alien convicted of an aggravated felony as defined in section 101(a)(43)(M) of the Immigration and Nationality Act. *See* § 237(a)(2)(A)(iii) of the Act. The appeal will be dismissed.

The removal charge stems from the respondent's 2003 conviction for making or subscribing a false tax return in violation of 26 U.S.C. § 7206(1). *See* Exh.

2A. The Immigration Judge found that the respondent was convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act, i.e., relating to fraud or deceit where the loss to the victim(s) exceeds $10,000. *See* I.J. at 2-5. We note that the respondent argues on appeal that pursuant to *Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004), a conviction under 26 U.S.C. 7206(1) cannot qualify as a fraud- or deceit-related aggravated felony under section 101(a)(43)(M)(i) of the Act. According to the respondent and the *Lee v. Ashcroft, supra,* case, because the second prong of the aggravated felony definition at 101(a)(43)(M)(ii) relates to tax evasion, that language trumps the use of this provision to define other tax crimes (i.e., that do not amount to tax evasion") as aggravated felonies. We disagree.

First, precedent decisions of the United States Court of Appeals for the Third Circuit are not binding on this case, as it arises under the jurisdiction of the United States Court of Appeals for the Fifth Circuit. Second, we disagree with the respondent's interpretation of the aggravated felony definition under, section 101(a)(43)(M)(i) of the Act. Interpretation of statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1994). The legislative purpose is presumed to be expressed by the ordinary meaning of the words used. *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). The plain

meaning of the words ordinarily controls, unless its application leads to absurd, unreasonable, or impractical results. *United States v. American Trucking Assn.*, 310 U.S. 534 (1940). In this regard, we note that Congress did not exempt tax-related crimes from the aggravated felony definition at section 101(a)(43)(M)(i). In fact, we are persuaded by the dissent in *Lee v. Ashcroft, supra,* that the drafters of the aggravated felony definition actually thought it "prudent to add" the latter part of the definition, i.e., for "tax evasion" under subsection M(ii) in order to capture any tax-related crimes that did not include "fraud" or "deceit" as express elements of the offense, thereby expressly understanding that some tax-related offenses would be included in subsection 101(a)(43)(M)(i). *See Lee v. Ashcroft, supra,* at 227 (Alito, J., dissenting). Thus, we find no impracticalities or absurdities will result from applying the plain meaning of the Act, i.e., including tax-related offenses within the ambit of subsection 101(a)(43)(M)(i) if the offense involves fraud or deceit. Finally, the respondent cannot seriously dispute that the underlying criminal statute itself prohibits the *wilful* making or subscribing of a false tax return. *See* Exh. 2A (Indictment). Knowledge of the falsity of one's statements is a critical element of both fraud and deceit as evidenced by their generic definitions, making the respondent's offense squarely classifiable as a crime relating to fraud or deceit under section 101(a)(43)(M)(i) of the Act. *See Webster's II New College Dictionary* (1st ed. 2001).

Having found that the respondent's conviction fits within the category of offenses involving "fraud or deceit," our next step is to determine whether the Immigration Judge properly considered the contents of the respondent's Pre-sentence Investigation Report ("PSR") in determining that the loss to the victim of the respondent's crime (i.e., the United States government) was in excess of $10,000, meeting the monetary loss threshold set forth in subsection 101(a)(43)(M)(i) of the Act. *See* I.J. at 2 (noting that the PSR reflected a loss in excess of $248,000). The use of a PSR to determine whether a respondent has been convicted of an aggravated felony has not been addressed by the United States Court of Appeals for the Fifth Circuit, under whose jurisdiction this case arises. However, in general, the Fifth Circuit has issued precedent endorsing the use of a "categorical approach" to determine whether an alien's prior criminal conviction is an "aggravated felony." *See United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), *see also United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005). Under the categorical approach, the court will "examine the elements of the [underlying criminal] offense, rather than the facts underlying the conviction" to determine whether an alien has been convicted of an aggravated felony. *See United States v. Gutierrez-Ramirez, supra,* at 356 (*citing Taylor v. United States,* 495 U.S. 575 (1990) (holding that where a categorical match does not exist, a court may examine a limited range of documents to determine the nature of the offense at issue). We note that *Taylor's* rationale has recently been extended and

clarified as to its application to cases in which a conviction is obtained via guilty plea, as opposed to a finding of guilt. *See Shepard v. United States,* 125 S. Ct. 1254 (2005). In such cases, a later court examining whether the conviction meets a statutory definition of, e.g., an aggravated felony or violent crime, is bound to consider only the "terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information." *Id.* at 1263.

Here, we note that the Immigration Judge took the information regarding the $248,335 loss to the victim of the respondent's crime from the PSR, which in turn states that this information came from the "written Plea Agreement." *See* Exh. 3 at Part A, p.1. The respondent does not dispute that this information accurately reflects the terms of the written plea agreement, nor did he ever dispute the information contained within the PSR before the sentencing judge. Exh. 3 at "Addendum" (noting that neither party objected to the PSR). In fact, the respondent was bound to object to factual errors in the PSR as unreliable or inaccurate; otherwise, the sentencing court could rely upon it in making factual findings. *See United States v. Fitzgerald,* 89 F.3d 218 (5th Cir. 1996). Given that no objection was proffered as to the total $248,335 loss figure, or to the $75,000 loss that pertains to the indicted tax year 1999, we find sufficient evidence of the parties' plea agreement reflected

in the PSR and, therefore, find that the amount of loss has been proven in accord with *Shepard v. United States, supra. See* Exh. 3 at 2.

Furthermore, we note that even if the *Shepard* case would dictate that the PSR's citation to a plea agreement is inadequate evidence of that agreement, consideration of the PSR still is not barred under the circumstances of the respondent's case. That is because the Immigration Judge limited his use of the PSR to make a factual finding distinct from a determination of the "nature of the offense," as was at issue in *Shepard.* In this regard, we note that the *Shepard* case involved the issue of whether a burglary conviction under Massachusetts law qualified as a violent felony so as to trigger a sentencing enhancement. *Id.* at 1258. The outcome in that case turned on whether the elements of the offense as reflected in the plea deal would also prove that the respondent was convicted of a "generic burglary" that could be considered a "violent felony" under the Armed Career Criminal Act. *Id.* Thus in that case, the relevant comparison was between the element of the underlying Massachusetts state law offense and the elements of a "generic burglary." In the respondent's case, there is no doubt that the nature of the offense of making and subscribing a false tax return under 26 U.S.C. 7206(1) includes the key elements of "fraud or deceit" to qualify as an aggravated felony under section 101(a)(43)(M)(i) of the Act. That is, the offense involves an act requiring submission of a known false document, thereby qualifying as

fraudulent or deceitful, as set forth above. Thus, the Immigration Judge's use of the PSR does not pertain to the same inquiry that was at issue in *Shepard* and *Taylor* (i.e., relating to the nature of the criminal act), but pertains to a collateral issue, that of the loss caused by the criminal act. Specifically, the loss is not an element of the underlying criminal statute. Further, in this respect, the $10,000 amount of loss is not a specific element in typical fraud statutes, and its inclusion in the aggravated felony definition signals that proof, aside from that pertaining to elements of criminal offenses, should be allowed in removal proceedings.

In making findings regarding collateral matters, the Immigration Judge was entitled to examine any reliable, credible evidence in reaching his conclusion regarding whether the respondent was removable as charged. *Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986); *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988). An Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the case made by the alien or any other person during any investigation or examination. *Id.* Such evidence may be admitted as long as it is probative and its use is fundamentally fair so as not to violate due process standards. Here, we find that the PSR contained material, probative evidence that the loss to the victim of the respondent's conviction under 26 U.S.C. 7206(1) – pertaining to tax year 1999 – was in excess of $10,000. The use was not fundamentally unfair given the

respondent's opportunity to object to its contents during his criminal proceedings. Under such circumstances, we find no error in the Immigration Judge's reliance on the PSR to determine the loss to the victim or in his finding that the respondent is an alien convicted of an aggravated felony under section 101(a)(43)(M)(i) of the Act. We will therefore dismiss the appeal.

ORDER: The appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW IMMIGRATION COURT
El Paso, Texas

File A 35 810 822 — September 15, 2004

In the Matter of

ALIEN NAME,)
) IN REMOVAL PROCEEDINGS
Respondent)

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, one who after admission has been convicted of an aggravated felony as defined in Section 101(a)(43) of the Act.

APPLICATION: Termination of proceedings

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Robert Shivers, Esquire	Robert Howell, Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 47-year-old married male, a native and citizen of Mexico who was admitted to the United States for a lawful permanent residence on April 6, 1977 at Hidalgo, Texas. On June 24, 2004 the Department of Homeland Security issued a Notice to Appear that the respondent would be removable from the United States under the provisions of Section

237(a)(2)(A)(iii) of the Immigration and Nationality Act by reason of his conviction on July 8, 2003 in the United States District Court for the Western District of Texas of making or subscribing in false return in violation of Title 20 United States Code Section 7206(1), with the amount of loss to the Government exceeding $10,000.

The respondent, with counsel, has admitted the truth of the first four factual allegations on the Notice to Appear, but denied the fifth factual allegation and denied the charge. Counsel for the Government has present a conviction record and criminal information (Exhibits 2 and 2A) showing that the respondent was convicted of Title 28 United States Code Section 7206(1) for making or subscribing to a false return, the date of the offense being noted as April 4, 2000 and the conviction being on his plea of guilty.

The Government has also presented a copy of the pre-sentencing investigation which was admitted to the record over objection. But since it is a prior report and is relevant to the factual allegation, I note that the respondent pled guilty to filing a false tax return willfully and knowingly for the calendar year 1999. I note that the pre-sentence investigation report on page 2 indicates that the additional taxes due an employee were $75,982. This is an amount in excess of $10,000. I also note that the pre-sentence at page 1, paragraph 2 references a written plea agreement wherein the Government and defendant agreed that the tax loss for sentencing purposes will include from tax years 1996 through 2000 for a total loss of

$248,335 (indiscernible). This is equally in excess of $10,000. However, the respondent was separately convicted for the year 1999. I conclude, however, that the evidence of record is sufficient to indicate that the tax loss for the year 1999 did exceed $10,000 and find that the Government has demonstrated the fifth factual allegation by clear and convincing evidence.

Counsel for the respondent has argued that this would not be an aggravated felony under Section 101(a)(43)(M) of the Act. I note that Section 101(a)(43)(M)(ii) cites a specific section of the Internal Revenue Code of 1986, which is codified at 26 U.S.C. Section 7201 and deals with evading income taxes. I find that the respondent clearly has not been convicted of an offense with that section. Counsel for the respondent has argued that the respondent has not been offense described under Section 191(a)(43)(M)(i) of the Act, citing to a 3rd Circuit case which held in a 2 to 1 decision that the only tax offense that could be considered under Section 101(a)(43)(M) is the specific subsection defined in Section 101(a)(43)(M)(ii). I disagree. I note first that the statute that the respondent violated requires that the person willfully makes and subscribes any returns, statement or other document which contains or is verified by a written declaration that is it made under the penalties of perjury and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony. I note that the elements of the offense include an intent to deceive (indiscernible) under the penalty of perjury. I find more convincing

the argument that tax evasion can include conduct which does not involve false statements made under penalty of perjury (indiscernible) structuring on intra-company or international transactions for the purpose of evading tax liability (indiscernible) can be accomplished to evade taxes without actually making a false statement under the penalty of perjury, for instance.

I find that the offense the respondent was convicted of does contain an element of fraud or deceit, that the Government was the victim and that the loss to the Government exceeds $10,000. I find that the intent of the Congress in setting the loss to the victim standard was to consider the initial loss without respect to any potential restitution. I conclude that the record does establish by clear and convincing evidence that the respondent is removable from the United States as charged on the Notice to Appear, by reason of his conviction of an offense that would be an aggravated felony under Section 101(a)(43)(M)(i) of the Act.

The respondent has designated his native Mexico for removal, if necessary. And no application for relief has been identified, nor has any come to the attention of the Court in researching the legal issues involved. The respondent is ineligible for a cancellation of removal pursuant to Section 240A(a)(3) of the Act. Accordingly, the following order must enter:

ORDER

IT IS ORDERED that the respondent be removed from the United States to Mexico, the country of his nativity and citizenship and the country designated by him on the charge contained in the Notice to Appear.

GARY BURKHOLDER
Immigration Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60914

JOEL ARGUELLES-OLIVARES
also known as, Joel Arguelles

Petitioner

v.

MICHAEL B MUKASEY,
US ATTORNEY GENERAL

Respondent

Petitions for Review of an Order
of the Board of Immigration Appeals

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed Mar. 5, 2009)

(Opinion 04/22/08, 5 Cir., ___, ___ F.3d ___)

Before GARWOOD, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court

be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

(✓) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Priscilla R. Owen
United States Circuit Judge

143

(2)

No. 08-1494

Supreme Court, U.S.
FILED
OCT 21 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

JOEL ARGUELLES-OLIVARES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
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QUESTIONS PRESENTED

In 8 U.S.C. 1101(a)(43)(M), the term "aggravated felony" is defined as including

> an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

The questions presented are:

1. Whether a conviction for a felony tax offense other than tax evasion in violation of 26 U.S.C. 7201 qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), where the offense involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.

2. Whether a conviction for filing a false tax return qualifies as an aggravated felony under 8 U.S.C. 1101(a)(43)(M)(i), where petitioner did not dispute a finding in the pre-sentence investigation report that petitioner owed $75,982 in additional taxes during the year in which the false tax return was filed.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 10
INS v. *St. Cyr*, 533 U.S. 289 (2001) 8
Kawashima v. *Gonzales*, 503 F.3d 997 (9th Cir. 2007) ... 10
Kawashima v. *Mukasey*, 530 F.3d 1111 (9th Cir. 2008) 10
Ki Se Lee v. *Ashcroft*, 368 F.3d 218 (3d Cir. 2004) 4, 5, 9
Negusie v. *Holder*, 129 S. Ct. 1159 (2009) 10
Nijhawan v. *Holder*, 129 S. Ct. 2294 (2009) 2, 7, 11, 12
Shepard v. *United States*, 544 U.S. 13 (2005) 7
Spies v. *United States*, 317 U.S. 492 (1943) 9
Taylor v. *United States*, 495 U.S. 575 (1990) 6, 7
United States v. *Gordon*, 242 F.2d 122 (3d Cir.), cert. denied, 354 U.S. 921 (1957) 9
United States v. *Johnson*, 319 U.S. 503 (1943) 9
United States v. *Mal*, 942 F.2d 682 (9th Cir. 1991) 9
Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 8

Statutes:

8 U.S.C. 1101(a)(43)(M) 2, 3
8 U.S.C. 1101(a)(43)(M)(i) ..... *passim*

Statutes—Continued: Page

8 U.S.C. 1101(a)(43)(M)(ii) ..... *passim*
8 U.S.C. 1227(a)(2)(A)(iii) 2
8 U.S.C. 1229a(c)(3)(A) 2
26 U.S.C. 7201 ..... 4, 6, 9, 11
26 U.S.C. 7206 6
26 U.S.C. 7206(1) 3, 8

In the Supreme Court of the United States

No. 08-1494

JOEL ARGUELLES-OLIVARES, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 46-85) is reported at 526 F.3d 171. The revised opinion of the court of appeals (Pet. App. 1-45) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 86-93) and the immigration judge (Pet. App. 94-98) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2009. A petition for rehearing was denied on March 5, 2009 (Pet. App. 99-100). The petition for a writ of certiorari was filed on June 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. An alien who has been convicted of an aggravated felony is subject to removal from the United States. 8 U.S.C. 1227(a)(2)(A)(iii). As relevant here, the term "aggravated felony" is defined as including

> an offense that—
>
> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
>
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.

8 U.S.C. 1101(a)(43)(M).

Earlier this year, this Court held that the $10,000-loss threshold in Subparagraph (M)(i) does "does not refer to an element of the fraud or deceit crime," and should be evaluated on the basis of a "circumstance- specific" approach rather than a "categorical" or "modified categorical" approach. *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2298, 2300-2303 (2009). In *Nijhawan*, the petitioner was an alien who had been convicted of a conspiracy to commit fraud, but the jury in his criminal trial did not make any findings about the amount of loss to the victims of the fraud. *Id.* at 2298. The Court nevertheless concluded that he had been convicted of an aggravated felony under Subparagraph (M)(i) and that the immigration judge (IJ) properly relied on sentencing-related material from the criminal proceeding to establish that the government satisfied its burden under 8 U.S.C. 1229a(c)(3)(A) of proving by "clear and convincing" evidence a loss in excess of $10,000. 129 S. Ct. at 2303.

2. Petitioner is a native and citizen of Mexico who was admitted to the United States on April 6, 1977. Pet. App. 94.

In 2003, petitioner pleaded guilty to a felony count of willfully making and subscribing a false tax return for calendar year 1999, in violation of 26 U.S.C. 7206(1). Pet. App. 2, 90, 95. The Pre-Sentence Investigation Report (PSR) explained that petitioner's written plea agreement identified a total tax loss of $248,335 on the basis of petitioner's tax returns for 1996-2000, and more specifically a loss of $75,982 for the return pertaining to 1999. *Id.* at 17, 95-96. Petitioner did not object to the calculations of loss included in the PSR. *Id.* at 17, 90. The district court sentenced petitioner to a 21-month term of imprisonment, to be followed by one year of supervised release. *Id.* at 24-25.

3. In 2004, the Department of Homeland Security (DHS) instituted removal proceedings against petitioner, charging him with having been convicted of an aggravated felony on the basis of his conviction for filing a false tax return. Pet. App. 94-95. Petitioner contested removability for two reasons. First, he argued that a conviction for filing a false tax return cannot be an aggravated felony under Section 1101(a)(43)(M) because its second clause (Subparagraph (M)(ii)) refers to tax evasion and thus forecloses any other tax offense from falling within Subparagraph (M)(i). *Id.* at 96. Second, he argued that the government could not prove that the loss from his offense exceeded $10,000. *Id.* at 95.

a. The IJ sustained the charge of removability against petitioner. Pet. App. 94-98. The IJ ruled that petitioner had been convicted of an aggravated felony as defined in Section 1101(a)(43)(M)(i), because petitioner's conviction under 26 U.S.C. 7206(1) for filing a false tax

return "contain[ed] an element of fraud or deceit" and the loss to the victim (the government) exceeded $10,000. Pet. App. 97. The IJ acknowledged that petitioner's offense did not fall within Subparagraph (M)(ii), which applies only to tax-evasion convictions under 26 U.S.C. 7201, but rejected the proposition that no other felony tax offense could be an aggravated felony under Subparagraph (M)(i). Pet. App. 96-97. In doing so, the IJ disagreed with the majority opinion in *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218 (3d Cir. 2004), which had concluded otherwise. See Pet. App. 96. Over petitioner's objection, the IJ considered the PSR, and concluded that the uncontested statement that petitioner owed an additional $75,982 in taxes in 1999 established by "clear and convincing evidence" that the loss associated with his tax offense exceeded $10,000. *Id.* at 95-96. The IJ ordered that petitioner be removed to Mexico. *Id.* at 98.

b. Petitioner appealed to the Board of Immigration Appeals (Board), which dismissed his appeal. Pet. App. 86-93.

The Board rejected petitioner's argument that filing a false tax return cannot be an aggravated felony under Subparagraph (M)(i). Pet. App. 87-88. The Board explained that, in this case arising under the Fifth Circuit's jurisdiction, it was not bound by the Third Circuit's decision to the contrary in *Ki Se Lee*, *supra*. Pet. App. 87. It then concluded that "Congress did not exempt tax-related crimes from the aggravated felony definition" in Subparagraph (M)(i), *id.* at 88, in part because it was "persuaded by" (*ibid.*) then-Judge Alito's dissent in *Ki Se Lee*, which reasoned that Congress could easily have added Subparagraph (M)(ii) in order to "be sure that no evasion case fell outside the definition" and to protect against the risk that "some courts would hold

that tax evasion falls outside the scope of [Subparagraph (M)(i)] because neither 'fraud' nor 'deceit' is a formal element of the offense." 368 F.3d at 227. The Board concluded that petitioner's offense—willfully making and subscribing a false tax return—satisfied the "plain meaning" of Subparagraph (M)(i) because it involved making a knowingly false statement. Pet. App. 88.

The Board then found no error in the IJ's decision to admit the PSR into evidence and to rely on it in finding that petitioner's false tax return resulted in a loss exceeding $10,000. Pet. App. 89-93. The Board specifically noted that petitioner had not disputed the information contained in the PSR, and had not disputed that the total loss amount in the PSR came from his written plea agreement. *Id.* at 90. The Board concluded that "the PSR contained material, probative evidence that the loss to the victim * * * was in excess of $10,000," and that using the PSR was "not fundamentally unfair" because petitioner had an "opportunity to object to its contents." *Id.* at 92-93.

4. Petitioner filed a petition for review in the United States Court of Appeals for the Fifth Circuit, which was denied. Pet. App. 1-45.

a. The court of appeals concluded that petitioner's conviction was for an aggravated felony under Subparagraph (M)(i) because his offense necessarily involved fraud or deceit and resulted in losses to the government of more than $10,000. Pet. App. 3-18. The court rejected petitioner's contention that Congress's inclusion of tax-evasion offenses in Subparagraph (M)(ii) excluded other tax offenses from the aggravated-felony definition. *Id.* at 3-9. Like the Board, it agreed with then-Judge Alito's dissent in *Ki Se Lee*, *supra*. Pet. App. 5-6. It explained that "Congress may well have seen [Subpara-

graph M(ii)] as a necessary addition" because "neither fraud nor deceit is a specific element of the crime of tax evasion under 26 U.S.C. § 7201." *Id.* at 6. The court found it "difficult to discern why Congress would want only" tax-evasion crimes "to constitute an aggravated felony, but not tax felonies involving fraud and deceit and the same amount of loss to the Government fisc," when both types of crimes are "serious" and "carry[] the same maximum fine." *Ibid.* Finally, the court noted that Sections 7201 and 7206 define "separate offense[s]" that do not always merge together. *Id.* at 8-9.

The court of appeals also rejected petitioner's contention that the IJ erred in relying on information in the PSR to determine the amount of loss associated with petitioner's offense. Pet. App. 9-20. The court held that its inquiry into the amount of loss was "not confined to the formal categorical approach of *Taylor v. United States*," 495 U.S. 575 (1990). Pet. App. 10-13. The court determined that there was "clear and convincing evidence that the PSR accurately reflected the amount of loss" in this case. *Id.* at 17-19. In reaching that determination, the court observed that petitioner did not object to the PSR before the district court; that, during the probation officer's interview, petitioner agreed with the chart reporting the tax losses by year; and that the district court adopted the PSR's factual findings. *Id.* at 17.

b. Judge Dennis dissented. Pet. App. 21-45. Although he did not think it was necessary to reach the question whether a conviction for filing a false tax return can be an aggravated felony under Subparagraph (M)(i), he found "persuasive[]" the Third Circuit's conclusion in *Ki Se Lee* that "Congress intended to single out tax evasion as the only tax crime meriting removability." *Id.* at 27; see *id.* at 27-32.

Judge Dennis also concluded that the IJ's reliance on the PSR to establish the amount of loss for petitioner's offense was inconsistent with circuit precedent he read as requiring the use of a "modified categorical approach" derived from this Court's decisions in *Taylor*, *supra*, and *Shepard* v. *United States*, 544 U.S. 13 (2005). Pet. App. 32-45. He concluded that the amount of loss under Subparagraph (M)(i) must be satisfied on the basis of "the record of conviction," but that the PSR was not "considered part of the record of conviction." *Id.* at 39, 42.

ARGUMENT

Petitioner claims (Pet. 36) to have identified "two clear circuit splits" on two different questions. The first question—whether a felony tax offense other than tax evasion can be an "aggravated felony" under 8 U.S.C. 1101(a)(43)(M)(i)—has precipitated a disagreement between the Third Circuit and the Fifth Circuit, but the decision below is correct and the narrow circuit split does not warrant review at this time. The second question—whether the amount of loss under Subparagraph (M)(i) must be established on the basis of a "categorical" approach, without reliance upon documents from the sentencing phase of the criminal trial--was answered by this Court's recent decision in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009). Because this Court unanimously rejected petitioner's arguments, no purpose would be served by further review of his case.

1. Petitioner renews (Pet. 4-5, 39-40) his contention that the reference to tax evasion in Subparagraph (M)(ii) prevents any other federal felony tax offense from being an aggravated felony under Subparagraph

(M)(i). The court of appeals was correct on the merits, and the current narrow conflict does not warrant review.

a. Petitioner identifies three reasons he believes that "[w]ell accepted rules of statutory construction weigh against the Fifth Circuit's determination that [Subparagraph (M)(i)] includes convictions under [26 U.S.C. 7206(1)]." Pet. 39. But none of those reasons is persuasive.

First, petitioner contends (Pet. 4, 39) that the "specific" reference in Subparagraph (M)(ii) to tax evasion governs the "general" reference in Subparagraph (M)(i) to offenses involving fraud or deceit. But this Court has explained that it understands petitioner's "canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision." *Varity Corp.* v. *Howe*, 516 U.S. 489, 511 (1996) (citation omitted). As in *Varity Corp.*, there is no reason to suppose that Congress intended its inclusion of a specific additional category of offenses in the definition of aggravated felony to serve as a *limitation* on other categories that apply by their terms—especially when the definition of aggravated felony "has always been defined expansively." *INS* v. *St. Cyr*, 533 U.S. 289, 295 n.4 (2001). Here, the specific reference to "tax evasion" in Subparagraph (M)(ii) would govern more general references, but only with regard to the category of offenses to which it speaks (tax evasion). The statute contains no specific rule for "tax offenses" considered more broadly.

Second, petitioner contends (Pet. 5, 39-40) that the court of appeals' construction renders Subparagraph (M)(ii) "surplusage." But that argument relies on the incorrect assumption that the tax-evasion offenses covered by Subparagraph (M)(ii) are entirely subsumed

within the fraud or deceit offenses covered by Subparagraph (M)(i). The offense of tax evasion can require, but does not necessarily require, proof of fraud or deceit; it can be accomplished "in any manner." *United States* v. *Mal*, 942 F.2d 682, 688 (9th Cir. 1991) (quoting *Spies* v. *United States*, 317 U.S. 492, 499 (1943)); see also *United States* v. *Johnson*, 319 U.S. 503, 515 (1943) ("The false return filed on March 15th was only one aspect of what was a process of tax evasion."); *United States* v. *Gordon*, 242 F.2d 122, 125 (3d Cir.) ("to conclude that the willful filing of a false report or return is the only way 'to evade or defeat any tax' is to give too narrow a construction to a statute which was intended to be more comprehensive") (citing *Johnson*, 319 U.S. at 515), cert. denied, 354 U.S. 921 (1957). As a result, even if many tax offenses—including many tax-evasion offenses—involve fraud or deceit and thus also fall within the general language of Subparagraph (M)(i), Congress still had reason to add Subparagraph (M)(ii) to capture tax-evasion offenses, because 26 U.S.C. 7201 does not include fraud or deceit as an element. See *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218, 227 (3d Cir. 2004) (Alito, J., dissenting). Moreover, the very fact that "Section 7206 is a separate offense that is 'separately punishable' from a violation of [Section] 7201" (Pet. App. 9) further demonstrates that the court of appeals' construction does not render any part of the statute superfluous.

Petitioner's third contention (Pet. 5, 40) is that any ambiguity in the statute should be construed in his favor. Yet, because the other canons of statutory construction he invokes do not have the effects he claims, there is no such ambiguity. To the contrary, "the clear language" of Subparagraph (M)(i), *Ki Se Lee*, 368 F.3d at 227 (Alito, J., dissenting), includes his conviction for

filing a false tax return, because his offense "involve[d] fraud or deceit in which the loss to the victim or victims exceed[ed] $10,000." 8 U.S.C. 1101(a)(43)(M)(i). Even if there were any ambiguity, the Attorney General has authority under the Immigration and Nationality Act to resolve statutory ambiguities in the first instance. See, *e.g.*, *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164, 1167 (2009) (finding statutory provision ambiguous, but remanding to the Board of Immigration Appeals for it to address the question in the first instance, rather than deferring to the narrowing construction offered by the alien); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (reversing court of appeals for its failure to give *Chevron* deference to a decision of the Board). A rule requiring that ambiguity be resolved in the alien's favor would usurp the interpretive authority of the Attorney General that this Court has confirmed in *Aguirre-Aguirre* and *Negusie*.

Thus, the court of appeals correctly concluded that a felony tax offense other than tax evasion could be an aggravated felony under Subparagraph (M)(i).

b. In any event, only two circuits have decided whether Subparagraph (M)(ii) precludes a tax offense other than tax evasion from being an aggravated felony under Subparagraph (M)(i). See Pet. App. 27 (Dennis, J., dissenting) ("[T]his Circuit is alone on one side of a circuit split, with the Third Circuit on the other.").[1]

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[1] In *Kawashima* v. *Gonzales*, 503 F.3d 997 (2007), the Ninth Circuit initially held that "tax offenses not covered by [Subparagraph] (M)(ii)'s specific reference to [Section] 7201 qualify as aggravated felonies under [Subparagraph] (M)(i) where the loss exceeds $10,000." *Id.* at 1001. That opinion, however, was withdrawn and superseded by *Kawashima* v. *Mukasey*, 530 F.3d 1111 (9th Cir. 2008). As petitioner notes (Pet. 12, 33), the superseding opinion decided the case on a different basis: that

That disagreement may be resolved by either of those courts. But even if the disagreement persists, this Court should wait for further developments if other circuits are confronted with the issue. Accordingly, review by this Court now would be premature.

2. Petitioner's second question presented (Pet. 4-7, 16-18, 37-38, 40-43) was answered by this Court's recent decision in *Nijhawan*, *supra*. Indeed, the Court specifically cited the decision below as part of the disagreement among the courts of appeals that it was resolving. See 129 S. Ct. at 2298.

Nijhawan held that the amount of loss necessary to establish an aggravated felony under Subparagraph (M)(i) is not to be determined under a "categorical" approach. 129 S. Ct. at 2298-2302. The Court also found that, "[i]n the absence of any conflicting evidence," the government's burden of establishing the amount of loss by clear and convincing evidence in the removal proceeding had been satisfied in that case on the basis of "sentencing-related material." *Id.* at 2303.

Those holdings are sufficient to dispose of petitioner's claims. *Nijhawan* rejected the *Taylor*-based categorical approach supported by petitioner and the dissent below. See Pet. 40-43; Pet. App. 32-38. Moreover, although petitioner impugns the reliability of PSRs in general (Pet. 6, 16-18), he has never disputed the

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Section 7201 offenses are *categorically* excluded from Subparagraph (M)(i) because Section 7201 does not include, as an element of the offense, a loss exceeding $10,000. *Id.* at 1117-1118. That reasoning—which track's petitioners' second question presented rather than his first—was expressly rejected by this Court's decision in *Nijhawan*. See 129 S. Ct. at 2298 (citing *Kawashima*). At the Ninth Circuit's request, the parties in *Kawashima* submitted supplemental briefs on August 20, 2009, about *Nijhawan*'s effect on the case.

PSR's statement that his 1999 tax offense resulted in a loss to the government of $75,982. Pet. App. 17, 90-91. Because that loss was "tied to the specific count[] covered by the conviction," *Nijhawan*, 129 S. Ct. at 2303 (quotation marks omitted), and because petitioner "mentions" no "conflicting evidence," *ibid.*, the court of appeals did not err in concluding that the government had met its burden of proving that the amount exceeded $10,000.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2009

[2] Even if petitioner were now to contest the $75,982 loss finding, such a factbound objection would not independently warrant further review.

REPLY BRIEF

143

(3)

No. 08-1494

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In The

Supreme Court of the United States

JOEL ARGUELLES-OLIVARES,

Petitioner,

v.

ERIC HOLDER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

REPLY BRIEF FOR THE PETITIONER 1

ARGUMENT 2

A. The Circuit Split Regarding Whether Filing a False Tax Return Constitutes an Aggravated Felony Should Be Resolved as It Is Important Legally and Practically 2

B. The Second Question Presented Having Been Resolved, Petitioner Respectfully Seeks Remand and an Order to Conduct an Evidentiary Hearing under the New Standards Announced in *Nijhawan* 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Alaka v. *Attorney General of United States*, 456 F.3d 88 (CA3 2006) 6

Ben. Nat'l Bank v. *Anderson*, 539 U.S. 1 (2003) 4

EC Term of Years Trust v. *United States*, 550 U.S. 429 (2007) 4

Hinck v. *United States*, 550 U.S. 501 (2007) 4

Ki Se Lee v. *Ashcroft*, 368 F.3d 218 (CA3 2004) 4

Knutsen v. *Gonzales*, 429 F.3d 733 (CA7 2005) 6

Nijhawan v. *Holder*, 557 U.S. ___, 129 S. Ct. 2294 (2009) ..... *passim*

STATUTES

26 U.S.C. § 7206(1) 1, 2

8 U.S.C. § 1101(a)(43)(M) ..... *passim*

8 U.S.C. § 1229a(c)(3)(A) 6

REPLY BRIEF FOR THE PETITIONER

1. Petitioner, Joel Arguelles, sought certiorari in this case to resolve two circuit splits touching the removal of aliens from this country.

2. The first question presented, whether a conviction for filing a false tax return in violation of 26 U.S.C. § 7206(1) qualifies as an aggravated felony under section 101(a)(43)(M)(i) of the Immigration and Naturalization Act (INA), 8 U.S.C. § 1101(a)(43)(M)(i), remains the subject of a circuit split. Mr. Arguelles respectfully urges this Court to grant certiorari in order to resolve this split due to its legal and practical importance.

3. While this petition was pending, the second of the two splits was resolved by this Court's opinion in *Nijhawan* v. *Holder*, 557 U.S. ___, 129 S. Ct. 2294 (2009).

a. Mr. Arguelles no longer seeks certiorari to resolve the second question presented, namely whether the *Taylor-Shephard* modified categorical approach must be applied to determine whether an alien has been convicted of an aggravated felony under INA § 101(a)(43)(M)(i).

b. Instead, Mr. Arguelles seeks a remand and order to conduct an evidentiary hearing to determine whether (a) sufficient evidence was presented, and whether (b) that evidence was submitted in a fundamentally fair procedure, according to the

dictates under *Nijhawan*, 557 U.S. at __, 129 S. Ct. at 2303 (slip op. at 11-12).

ARGUMENT

A. The Circuit Split Regarding Whether Filing a False Tax Return Constitutes an Aggravated Felony Should Be Resolved as It Is Important Legally and Practically.

1. As the Respondent concedes (Resp. Opp. at 7), the first question presented is the subject of a circuit split: whether a conviction for filing a false tax return in violation of 26 U.S.C. § 7206(1) qualifies as an aggravated felony under INA § 101(a)(43)(M), 8 U.S.C. § 1101(a)(43)(M). The Third Circuit holds *no*, while the Fifth Circuit holds *yes*.

a. This split is important *legally* because the proper application of three canons of statutory interpretation are at issue. Two of these three canons – that the specific governs the general, and that statutes are to be read to avoid surplusage – are applied broadly; the third – that ambiguities are to be read to favor the alien – applies in the majority of cases interpreting the Immigration and Naturalization Act (INA). Congress, the courts, aliens, and the attorneys who advise aliens all rely on having a clear understanding of how these canons are applied.

Here, the Third and Fifth Circuits apply the rules in diametrically opposed fashions, and come to opposite conclusions regarding the applicability of

INA § 101(a)(43)(M) to tax-code violations. If the Third Circuit is correct, the only tax-code violation which can lead to removal is the capstone of tax violations – tax evasion. If the Fifth Circuit's reading of that section is correct, an alien may be removable as an aggravated felon for a far greater range of conduct, including filing a false tax return.

b. This split is important to resolve *practically* because an alien found to have been convicted of an aggravated felony is permanently barred from re-entry to the United States. In Petitioner's case, this will result in his separation from his U.S. citizen wife and young children, his removal from this country which has been his home since 1977, and the loss to the United States of a successful small-business owner and citizen who has paid all tax restitution in full. For other aliens, removal from the United States will depend, not on their conduct alone, but in which state they reside – an entirely arbitrary factor which should play no role in such a major consequence as permanent exile from their adopted land.

2. The Respondent argues against certiorari, saying the split is a "narrow conflict," as only two circuits have decided whether subparagraph (M)(ii) precludes a tax offense other than tax evasion from being an aggravated felony under (M)(i). (Resp. Opp. at 8).

This Court has never counted noses to determine if a sufficient number of circuit courts have weighed in on a question before granting certiorari. *See, e.g.*,

Hinck v. *United States*, 550 U.S. 501 (2007) (split between Fifth Circuit and Federal Circuit); *EC Term of Years Trust* v. *United States*, 550 U.S. 429 (2007) (split between Fifth and Ninth Circuits); *Ben. Nat'l Bank* v. *Anderson*, 539 U.S. 1 (2003) (no circuit split regarding interpretation of a federal statute by the Eleventh Circuit).

3. The Respondent further suggests that the disagreement "may be resolved by either of those courts," and that, in the alternative, this Court "should wait for further developments if other circuits are confronted with the issue." (Resp. Opp. at 11).

Resolution by the Third and Fifth Circuits is not likely. The Fifth Circuit denied a petition for panel rehearing and also declined to rehear the case *en banc*. And the Third Circuit's holding, in *Ki Se Lee* v. *Ashcroft*, 368 F.3d 218 (CA3 2004), has been praised as "well reasoned" by Judge Dennis in his dissent to the Fifth Circuit's opinion below. (Revised Op. at 22). There is no indication either court of appeals is inclined to reverse itself.

Waiting for "further developments" in other circuits is likely to lead only to further confusion. And as noted above, while this is an abstract question of law for the courts, and waiting for further development might, at that level, make sense, for the aliens affected, resolution of this question determines whether they are permitted to remain in this country with their families, or will be banished forever.

4. The Fifth Circuit's interpretation of INA § 101(a)(43)(M) is incorrect, and should be corrected. Judge Dennis, in his dissent in the opinion below, described the majority as "abandon[ing] . . . well-established basic principles" of statutory construction, in contrast with the Third Circuit's "well-reasoned" decision which "fully comports with the traditional tools used in the holistic endeavor of statutory construction." (Revised Op. at 22 (J. Dennis, dissenting)). The Fifth Circuit's holding also ignores Congress's intent to punish more severely the "capstone" tax crime of tax evasion than lesser crimes such as filing a false tax return. For these reasons, it is not correct on the merits, and the case warrants review and correction by this Court.

B. The Second Question Presented Having Been Resolved, Petitioner Respectfully Seeks Remand and an Order to Conduct an Evidentiary Hearing under the New Standards Announced in *Nijhawan*

Petitioner sough certiorari to review the Fifth Circuit's holding in the case below regarding whether Congress intended for INA § 1011(a)(43)(M)(i) to apply only to convictions under statutes that included a monetary loss to a victim in excess of $10,000 as an element of the offense.

This Court recently issued its opinion in *Nijhawan* v. *Holder*, in which it held that "Congress did not intend subparagraph (M)(i)'s monetary

threshold to be applied categorically, i.e., to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion." 557 U.S. at __, 129 S. Ct. at 2202 (slip. op. at 10).

This question having thus been resolved, Petitioner withdraws that portion of his petition for certiorari regarding the second question presented.

Instead, if the Court should decide to deny certiorari on the first question, Petitioner respectfully seeks remand to the court below for an evidentiary hearing in accordance with the standards described in *Nijhawan*. These standards require "the use of fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims." *Nijhawan*, 557 U.S. at __, 129 S. Ct. at 2203 (slip. op. at 11). They also require that the evidence that the Government offers meets a "clear and convincing" standard. 8 U.S.C. § 1229a(c)(3)(A). And further, the loss amount must be tethered to offense of conviction; the amount cannot be based on acquitted or dismissed counts or general conduct. *Nijhawan*, 557 U.S. at __, 129 S. Ct. at 2203 (slip. op. at 12) (citing *Alaka* v. *Attorney General of United States*, 456 F.3d 88, 107 (CA3 2006); *Knutsen* v. *Gonzales*, 429 F.3d 733, 739-740 (CA7 2005)).

The evidence submitted to show the loss amount in Petitioner's case was a pre-sentence report (PSR) which included a table purporting to contain, *inter alia*, the "additional tax due/owing" for 1999. This table showed that amount to be in excess of $10,000. As Judge Dennis noted in his dissent, "the PSR's 'proof' of Arguelles's 1999 tax liability amounts to nothing more than an unsourced and unverified chart that is not accompanied by IRS documents or raw data that provide any indication as to how these numbers were calculated or even who specifically performed the calculations." (Revised Op. at 32, n.10). Judge Dennis further explained that:

> The majority's characterization of Arguelles as having agreed to certain facts relating to the loss amount for the 1999 tax year is supported only by self-serving references to the probation officer's statements in the PSR and its addendum. The majority does not – because it cannot – point to any statement in the record of conviction by which Arguelles admitted to or failed to object to the factual statements contained in the PSR, as the Government did not include a transcript of the plea colloquy or the sentencing hearing in the immigration record, in addition to not including the Factual Basis and Plea Agreement.

(Revised Op. at 31, n.9).

An evidentiary hearing which comports with this Court's recently-announced requirement under *Nijhawan* of "the use of fundamentally fair

procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims" is necessary to protect the Petitioner's right to due process in his removal hearing.

CONCLUSION

The petition for a writ of certiorari should be granted so that the Court can resolve the circuit split regarding whether filing a false tax return constitutes an aggravated felony.

Further, remand in order to adhere to the standards of *Nijhawan* is appropriate in the event that this Court should decide to deny certiorari on the first question presented.

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